88-1385

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., AND UNITED TECHNOLOGIES CORPORATION,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Occupational Safety and Health Act and Article I of the United States Constitution prohibit the delegation by the Occupational Safety and Health Administration of its rulemaking authority to a private entity, without setting standards to guide the private entity's decisionmaking, where the private organization's determinations automatically become law without review by OSHA.

2. Whether Petitioners were deprived of their statutory right to be heard concerning the content of an Occupational Safety and Health Act standard regulating their activities by the lower court, which directed the Agency to apply the standard to them but which also mandated that the Agency disregard the procedural requirements of its enabling legislation.

3. Whether the lower court's failure to require OSHA to demonstrate that a significant risk exists in each regulated industry conflicts with the Occupational Safety and Health Act and has created a conflict within the circuits.

4. Whether the lower court's failure to require OSHA to demonstrate that the revised standard is feasible for each regulated industry conflicts with Section 6(b) of the Occupational Safety and Health Act and has created a conflict within the circuits.

LIST OF PARTIES

This proceeding consists of four petitions for review which were consolidated below. In Case No. 88-3346, the parties consisted of The National Grain and Feed Association, Inc.,* as Petitioner and The Occupational Safety and Health Administration, United States Department of Labor as Respondent. The National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Counsel on Occupational Safety and Health, were all Intervenors.

In Case No. 88-3345, the parties consisted of the Associated Builders and Contractors, Inc., as Petitioner and William E. Brock, Secretary of Labor, John A. Pendergrass, Assistant Secretary for Occupational Safety and Health, and the Agency itself as Respondents. The National Grain and Feed Association, Inc., and United Technologies Corporation intervened on behalf of the Petitioner.**

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* The National Grain and Feed Association ("NGFA") is a voluntary association of grain and feed companies. The operations of its 1,300 members include country elevators, terminal elevators, processors and exporters. There are 42 state and regional grain and feed associations affiliated with NGFA representing more than 10,000 grain and feed companies nationwide.

** Other intervenors included the National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, Sheet Metal and Air Conditioning Contractors National Association, Associated General Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, and the National Paint and Coating Association.

In Case No. 88-3347, the parties consisted of The Associated General Contractors of Virginia and the Associated General Contractors of America as Petitioners and The Occupational Safety and Health Administration, United States Department of Labor as Respondent. The National Grain and Feed Association, Inc., and United Technologies Corporation intervened on behalf of the Petitioners. The other intervenors included United Steelworkers of America, AFL-CIO-CLC, and the Building and Construction Trades Department, AFL-CIO.

In Case No. 88-3348, the parties consisted of the United Technologies Corporation *** as Petitioner and the Occupational Safety and Health Administration, United States Department of Labor as Respondent.

*** For purposes of Sup. Ct. R. 28.1, United Technologies Corporation represents that it has no parent corporation. United Technologies Corporation does own voting securities in a large number of domestic and foreign corporations. A list of those corporations and their respective states or countries of incorporation is set forth in the Appendix to this Petition, Pet. App. 69a.

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v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, The National Grain and Feed Association, Inc. ("NGFA") and United Technologies Corporation ("UTC"), respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceedings on November 25, 1988.[1]

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[1] The above-entitled proceedings were consolidated below with two other cases in which NGFA and UTC intervened: *Associated Builders and Contractors, Inc. v. The Occupational Safety and Health Administration, United States Department of Labor* (No. 88-3345), and *The Associated General Contractors of America, et al. v. Occupational Safety and Health Administration, United States Department of Labor* (No. 88-3347). Petitioners in both cases separately filed with this Court petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit. As Intervenors in both cases, NGFA's and UTC's instant joint petition for a writ of certiorari extends to the related cases in Nos. 88-3345 and 88-3347 pursuant to Sup. Ct. R. 19.4.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a) is reported as *Associated Builders and Contractors, Inc. v. Brock*, 862 F.2d 63 (3d Cir. 1988).[2]

JURISDICTION

Pursuant to Section 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f), Petitioners separately petitioned for judicial review of a standard promulgated by the Occupational Safety and Health Administration ("OSHA"). The court below entered judgment and an opinion denying the petitions for review on November 25, 1988. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions, statutes and regulations involved in the case include Article I, Section 1 of the United States Constitution; Sections 3(8), 6(b)(2), 6(b)(3), 6(b)(5) and 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652(8), 655(b)(2), 655(b)(3), 655(b)(5) and 655(f); and the Hazard Communication Standard, 29 C.F.R. § 1910.1200(d)(3). Verbatim excerpts are set out in the Appendix, Pet. App. 74a.

STATEMENT OF THE CASE

A. Development of the Hazard Communication Standard

On March 19, 1982, OSHA published a proposed hazard communication standard.[3] 47 Fed. Reg. 12,092, 12,119.

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[2] Two other decisions of the same court in the same matter are also relevant to the issues raised herein: *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) ("USWA I"), Pet. App. 22a; *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) ("USWA II"), Pet. App. 54a.

[3] Publication of a proposed standard is required by the Occupational Safety and Health Act as a necessary precondition to OSHA's

The proposed standard by its own terms was specifically limited in application to "all [manufacturing] employers in SIC Codes 20 through 39 (Division D, Standard Industrial Classification Manual)," *Id.* at 12,119, and proposed methods to identify hazardous chemicals and notify and protect employees from them.

OSHA recognized in its 1982 proposal that the terms of the proposed standard it published had been designed specifically for the manufacturing sector and that those terms might not be appropriate for other industries. As the Secretary noted:

> Once finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture.

Id. at 12,101.

After providing a written comment period, informal public hearings, and a post-hearing comment period, as required by Sections 6(b)(2) and 6(b)(3) of the Occupational Safety and Health Act (the "Act" or "OSH Act"), 29 U.S.C. § 655(b)(2) and (3), OSHA published, on November 25, 1983, the final Hazard Communication Standard (the "HCS"). 48 Fed. Reg. 53,280. The HCS was designed to reduce the hazards faced by manufacturing workers who handled chemicals without adequate information concerning hazards of the chemicals, safe handling precautions, and emergency first aid procedures. *Id.* at 53,231.

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promulgation of a final standard. Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2), specifically provides in pertinent part that:

> The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments.

The HCS required chemical manufacturers or importers to develop a material safety data sheet ("MSDS") for each hazardous chemical they produced or imported.[4] Chemical manufacturers and importers were required to provide appropriate MSDSs to all manufacturing purchasers of hazardous chemicals with their initial shipments. 29 C.F.R. § 1910.1200(g). Manufacturers who used hazardous chemicals were required to retain the MSDSs, *id.*; prepare a written hazard communication plan, 29 C.F.R. § 1910.1200(e); and conduct employee training. 29 C.F.R. § 1910.1200(h)(2). Like the proposed standard, the HCS was specifically limited to manufacturers.

The HCS also provided several specific guidelines for determining which chemicals should be classified as hazardous for purposes of the Standard. While not contained in the proposed standard, the final HCS provided that all chemicals listed in the latest edition of the *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, published by the American Conference of Governmental Industrial Hygienists, Inc. ("ACGIH TLV Table"), must be treated as hazardous.[5] 29 C.F.R. § 1910.1200(d)(3).

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[4] The HCS required each MSDS to contain certain information including: (1) the composition of the chemical; (2) the hazards associated with the chemical; (3) precautions for safe handling and use of the chemical; (4) the identity of the chemical manufacturer; and (5) the threshold limit value set for the chemical by the American Conference of Governmental Industrial Hygienists. 29 C.F.R. § 1910.1200(g).

[5] The American Conference of Governmental Industrial Hygienists, Inc. ("ACGIH") is a professional society of occupational health professionals who work for governmental agencies and educational institutions. Its membership requirements effectively exclude industry representatives. ACGIH is not a governmental entity.

ACGIH annually appoints members of the organization to the Chemical Substance TLV Committee. This Committee determines

B. Revision of the Hazard Communication Standard

The HCS was challenged by the United Steelworkers of America, AFL-CIO and others.[6] *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) ("USWA I"). Chiefly at issue was OSHA's decision to limit the HCS to manufacturing employees in SIC Codes 20-39. Also challenged was OSHA's decision not to include in the HCS the Registry of Toxic Effects of Chemical Substances (RTECS), compiled by the National Institute for Occupational Safety and Health ("NIOSH"), as a conclusive source to determine whether a chemical is hazardous and therefore subject to the Standard.

The Third Circuit held that OSHA failed to show why it was not feasible to extend the HCS to non-manufacturing sectors. For this reason, it ordered the Agency either to extend the HCS or state why such an application would not be feasible. USWA I, Pet. App. 42a. The court, however, upheld OSHA's decision not to include the RTECS list, ruling that the Agency's determination that the list was overinclusive was supported by substantial evidence in the record. *Id.* at 42-43a.

In response to this ruling, OSHA realized that the record it developed in the 1982 rulemaking lacked evidence regarding the feasibility of extending the HCS's coverage to non-manufacturers. 52 Fed. Reg. 31,852, 31,854. Ac-

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those substances which appear in its general ACGIH TLV Table. The Committee, itself, has no published guidelines or procedures for either adjusting the TLV's of substances that are already on the TLV Table or for determining what substances should be added to the TLV Table. The sole procedure adopted is to provide notice of proposed committee actions. No formal procedure exists for reviewing comments or addressing criticism of scientific studies relied on by ACGIH.

[6] Of course, because non-manufacturers were not adversely affected by the HCS—as the Standard applied only to manufacturers—neither they nor their representatives had a right to petition a court for review of the Standard. *See Fire Equipment Mfrs. Ass'n v. Marshall*, 679 F.2d 679 (7th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

cordingly, OSHA determined that it was necessary and appropriate under the statute to initiate further rulemaking. *Id.* On November 27, 1985, the Agency issued an Advance Notice of Proposed Rulemaking ("1985 ANPR"), which consisted of various questions, including questions regarding the potential impact of the extension of the HCS to the non-manufacturing sector. 50 Fed. Reg. 48,794.[7] Based on the responses to the 1985 ANPR and on the previous rulemaking record, the Agency began to draft a proposed rule which it intended to publish for notice and comment. 52 Fed. Reg. 31,852, 31,854.

However, on January 27, 1987, petitioners in the 1985 challenge to the HCS filed a motion for an order enforcing the court's earlier decision, asserting that the decision did not authorize OSHA to embark on additional fact gathering. Agreeing with the petitioners, the court ruled that its earlier remand order required a consideration of infeasibility without further rulemaking. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) ("USWA II").[8]

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[7] NGFA submitted a response to the 1985 ANPR urging that classification of nuisance dust as a hazardous chemical by virtue of its presence in the ACGIH TLV Table be dropped and complaining that OSHA had improperly delegated to ACGIH authority to determine what chemicals would be considered hazardous. NGFA responded out of concern with the inclusion of nuisance dust on the ACGIH TLV Table and the possibility that various types of grain dust, which at that time were not on the ACGIH TLV Table, might be considered a nuisance dust.

This was the first opportunity NGFA had to comment on the incorporation of the ACGIH TLV Table into the Standard. Adoption of the ACGIH TLV Table was not included in the original proposed rule. 47 Fed. Reg. 12,092, 12,103. Further, because the HCS applied only to the manufacturing sector, it excluded grain elevators from its coverage, thereby depriving NGFA of standing to raise the matter in a petition for review. Grain elevators are deemed wholesalers, and are included primarily in SIC 5153.

[8] Again, as in USWA I, none of the affected non-manufacturing industries were represented before the court. It was, of course, too late to intervene in the litigation.

OSHA sought rehearing of the court's decision, arguing that the record was insufficient to support a finding of feasibility for non-manufacturing industries. OSHA Pet. Rehearing at 8. OSHA also pointed out that the court's order requiring OSHA to extend the HCS unless it could show that it would be *infeasible* for specific industries was inconsistent with the Act in that the court "shifted the burden of proof onto the proponents of non-feasibility or at least has improperly lowered the burden the Secretary bears to establish the feasibility of a standard." *Id.* at 11. The petition for rehearing was denied.

Notwithstanding OSHA's belief that it was required to issue a notice of proposed rulemaking and develop the rulemaking record with regard to non-manufacturers, the Agency, on August 24, 1987, promulgated the revised Hazard Communication Standard (the "RHCS"). The RHCS extends beyond manufacturers to all industrial classifications, and also contains numerous additional substantive modifications to the HCS. 52 Fed. Reg. 31,852, 31,877-86. The RHCS, however, retained the reliance on the ACGIH TLV Table as a source of determining what chemicals shall be classified as hazardous for purposes of the Standard.

Grain elevators were particularly affected by the RHCS because, in 1986, after NGFA and other grain industry representatives responded to the 1985 ANPR, oat, wheat and barley dust were added to the ACGIH TLV Table. As a result, when the RHCS was adopted, these grain dusts automatically were determined to be hazardous "chemicals" for purposes of the RHCS. Further, OSHA broadened the category of employers deemed to be "chemical manufacturers" by changing the definition of the term in the RHCS. This action converted grain elevator operators into chemical manufacturers. This occurred with no rulemaking notice. The affected members of the public had no opportunity to comment or be heard on the issue by OSHA.

C. The Court's Decision Below

Petitioners and certain construction industry representatives filed petitions for review of the RHCS. The court below, in its decision dated November 25, 1988, denied the petitions for review.

The court rejected NGFA's contention that the delegation to ACGIH to determine which chemicals are hazardous for purposes of the RHCS was unlawful. The court held that its decision in USWA I that OSHA properly *refused* to adopt the RTECS list into the RHCS was controlling, and demonstrated that OSHA could rely on information developed by other parties. Pet. App. 15a. The court continued that even were this not the case, reliance on such information was consistent with Section 6(b)(5) of the Occupational Safety and Health Act. *Id.* The court ignored NGFA's contention, which was admitted by the Agency, that OSHA not only relied on the ACGIH TLV Table, it adopted its conclusions with no independent review.

The court further held that the petitioners were foreclosed by USWA II from contending that non-manufacturers did not receive adequate notice from the Agency that they might be regulated by the RHCS, Pet. App. 10a, even though they could not have petitioned for review of the HCS. The court failed to address petitioners' assertion that Section 6(b) of the Act required publication of a proposed rule applicable to non-manufacturers prior to the promulgation of the RHCS.

The court rejected petitioners' argument that the Agency violated the Act by failing to make a significant risk finding on an industry by industry basis. Invoking an unprecedented distinction, the court ruled that the RHCS was a "performance-oriented information disclosure standard" and that for this reason "the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries." Pet. App. 13a. The court did not even address NFGA's assertion that OSHA failed to satisfy its obliga-

tion under the Act and decisions of this Court to make a finding, supported by substantial evidence in the record, that grain and nuisance dust represented a significant health risk.

Finally, the court rejected petitioners' assertion that OSHA failed to show that the RHCS was feasible for each affected industry. The court concluded that the record developed for the manufacturing sector contained no credible evidence that the RHCS would be technologically or economically infeasible for any industrial sector. Pet. App. 14a. The court, however, made no determination that there was substantial evidence in the record to support the feasibility of the RHCS.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE OCCUPATIONAL SAFETY AND HEALTH ACT AND ARTICLE I OF THE UNITED STATES CONSTITUTION PROHIBIT THE DELEGATION BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF ITS RULEMAKING AUTHORITY TO A PRIVATE ENTITY, WITHOUT SETTING STANDARDS TO GUIDE THE PRIVATE ENTITY'S DECISIONMAKING, WHERE THE PRIVATE ORGANIZATION'S DETERMINATIONS AUTOMATICALLY BECOME LAW WITHOUT REVIEW BY OSHA.

The RHCS' adoption of the ACGIH TLV Table for the purpose of determining which substances (grain dust, after all, is not a "chemical") are hazardous and therefore covered by the Standard represents a dangerous end-run around the procedural requirements imposed on agency rulemaking by both the Occupational Safety and Health Act and the United States Constitution. If this hazard determination provision is permitted to stand, OSHA (or any other federal agency) would be able to abdicate its duty to review and consider evidence, and make decisions based on the priorities established by Congress, simply by delegating its rulemaking authority to a private party. In addition, placing governmental

power in the hands of a private organization means that the substance of agency rules will be determined without the procedural protections of the agency's enabling statute, or the Administrative Procedure Act. As with OSHA's delegation to ACGIH, the procedures and findings of the private group would be, in effect, unreviewable by a court.

While it is appropriate to permit an agency to rely, to some degree, on the findings of national professional organizations, the RHCS simply goes too far in allowing OSHA to completely remove itself from the actual decisionmaking process. Where an agency, as OSHA has done in this case, announces that it will endorse and adopt as law, in perpetuity, the findings of a private organization, substantive changes in agency standards will take effect, and legal obligations will be created, with absolutely no consideration or participation by the agency, much less other interested parties. In order to address the important statutory and constitutional issues of agency decisionmaking and accountability raised by OSHA's delegation of authority to a private organization, review by this Court is warranted.

A. Review Is Warranted to Address Whether OSHA's Delegation of Rulemaking Authority to ACGIH Exceeds Its Authority Under the Occupational Safety and Health Act, as Interpreted by This Court in *American Petroleum Institute.*

OSHA's delegation of authority to ACGIH to determine what substances should be designated as hazardous for purposes of the Standard circumvents the statutory limitations placed on the Agency's authority by Congress, as interpreted by this Court in *Industrial Union Dep't v. American Petroleum Institute,* 448 U.S. 607 (1980) (plurality opinion). This delegation constitutes a novel and dangerous means of evading these procedural requirements, and one which agencies, including OSHA, could well employ in other contexts if it is permitted in this case.

While OSHA enjoys a "broad congressional mandate to ensure safe working conditions," *Public Citizen Health Research Center Group v. Tyson*, 796 F.2d 1479, 1484 (D.C. Cir. 1986), its authority is not limitless. OSHA can only act within the authority conferred by Congress in the OSH Act. OSHA is restricted by Section 3(8) (defining occupational safety or health standards) and Section 6(b) (containing procedural and substantive requirements for rulemaking) of the Act, which impose extensive and detailed obligations related to rulemaking. The limitations imposed on OSHA's authority by these provisions are mandatory obligations. However, as demonstrated below, by adopting ACGIH's conclusions without independent analysis, OSHA has completely ignored the mandates of the Act and circumvented the limitations Congress purposefully placed on OSHA's authority.

Section 6(b) of the Act, 29 U.S.C. § 655(b), empowers OSHA to promulgate occupational safety or health standards. An occupational safety or health standard is defined in Section 3(8) of the Act as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). In promulgating standards, OSHA must comply with the general rulemaking requirements of Section 6(b). Further, in promulgating standards involving toxic materials or harmful physical agents, OSHA must also comply with Section 6(b)(5) of the Act, which requires OSHA to:

> set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment

> of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

29 U.S.C. § 655(b)(5).

The Supreme Court has interpreted these provisions as imposing on OSHA an affirmative obligation to find, as a threshold matter, that the health risk posed by the regulated substance is significant, and to show that its standard will significantly reduce the risk from the hazard. In *American Petroleum Institute*, the Court invalidated an OSHA standard regulating occupational exposure to the chemical benzene, holding that the OSH Act required the Agency, "before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment." 448 U.S. at 639. The Court found that the Agency made no attempt to satisfy the "threshold responsibility of establishing the need for more stringent standards," and thus, had exceeded its statutory authority in promulgating a new standard. *Id.* at 659. *See also Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398, 410 (5th Cir. 1980) ("The reasonably necessary or appropriate limitation [in Section 3(8)] requires that OSHA regulations must be reasonably essential or at least reasonably efficacious in reducing a significant risk of material harm."); *American Petroleum Institute v. OSHA*, 581 F.2d 493, 502-03 (5th Cir. 1978), *aff'd on other grounds*, 448 U.S. 607 (1980), ("Before it regulates, the agency must show that a hazard exists and that its regulation will reduce the risk from the hazard . . .").

OSHA here has failed to satisfy the requirements imposed on it under the Act, and set out in *American Petroleum Institute*. There is nothing in the record regarding grain dust at all, much less anything to sup-

port OSHA's designation of grain or nuisance dust as a hazardous substance. Nor has OSHA made the required threshold finding that such dusts present a significant health risk.[9] Quite simply, OSHA has never considered these issues, because it merely adopted, without independent analysis of the reasons therefor, the conclusions of ACGIH that certain types of grain dust present a health hazard.[10]

This wholesale reliance on the determinations of ACGIH circumvents the limitations placed on OSHA's authority by Congress in enacting Sections 3(8) and 6(b)(5) of the Act. If OSHA permits a body other than itself (in this case, ACGIH), to make a judgment on a critical regulatory issue, which judgment OSHA accepts and adopts with no consideration of the data, procedure, or other factors that underlie that judgment, then the findings and analyses required by Sections 3(8) and 6(b)(5) of the Act simply cannot be made. They certainly were not made in this case. OSHA's reliance on the ACGIH determinations without benefit of independent analysis of their underlying bases and without benefit of public comment and criticism is a clear violation of the Act, and should be invalidated.

Exclusive reliance on the judgment of an outside decision-maker is wholly inconsistent with the statutorily-imposed obligation to *gather* and *review* evidence, and to make decisions guided by the priorities established in the Act. The designation of grain dust as a hazardous chemical for purposes of the RHCS is a quintessential example of how such reliance violated the Act.

When OSHA promulgated the HCS in 1983, grain dust was not designated by ACGIH as hazardous. Obviously, at that time, OSHA had not considered the issue of

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[9] Indeed, in its brief below, OSHA admitted that it made no significant risk determination regarding grain dust.

[10] Not only was the most current ACGIH TLV Table not placed in the rulemaking record, OSHA failed to include any material supporting ACGIH's determinations in the record.

whether grain dust is a health hazard. In 1986, when ACGIH established a TLV for grain dust, it *automatically*, with no consideration by OSHA, became subject to the HCS.[11] OSHA has no mechanism in place in the RHCS (nor did such a mechanism exist in the HCS) by which it receives notice of changes to the ACGIH TLV Table. There is no procedure by which OSHA evaluates those changes. Consequently, substantive changes to the RHCS are made with absolutely no participation by OSHA—much less other interested parties—and no review.[12] However, if the decision below is allowed to stand, such a procedure could become common practice.[13] Other federal agencies could abdicate their regulatory roles and rely exclusively on private organizations to set standards. The National Highway Traffic Safety Administration, for instance, could simply adopt the findings and determinations of the Society of Automotive Engineers as an exercise of the agency's responsibility to promulgate safety standards for automobiles. The Food and Drug Administration could simply delegate to the Pharmaceutical Manufacturers Association its authority to promulgate standards regulating food and drugs.

In addition, principles of statutory interpretation and the legislative history of the OSH Act indicate that Congress did not intend to grant OSHA the general authority to adopt wholesale the standards of a private organization such as ACGIH. Under Section 6(a) of the Act, OSHA was authorized, for a brief and clearly defined

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[11] ACGIH is not subject to any procedural requirements, much less those to which OSHA is subject under the OSH Act. Nor are its designations subject to the substantive requirements of the OSH Act, such as determinations of technological and economic feasibility.

[12] Judicial review of such an addition or modification would not be available because the time for filing a petition for review, 60 days from the promulgation of the standard, *see* Section 6(f), 29 U.S.C. § 655(f), would long since have expired.

[13] Obviously, where OSHA does not participate in an addition or modification to a promulgated standard, the notice and comment procedure of Section 6(b) cannot be satisfied.

period which has long since expired, to summarily promulgate established national consensus or Federal standards which had previously been subjected to procedures which ensured, to the extent possible, consistency with the standard-setting process contained in Section 6(b).[14] The legislative history of the Act confirms that the procedures in Section 6(a) for summary adoption of outside standards protected the interests otherwise served by full rulemaking.

> Since, by the Act's definition, a "consensus standard" is one which has been adopted under procedures which have given diverse views an opportunity to be considered and which indicate that interested and affected persons have reached substantial agreement on its adoption, it is appropriate to permit the Secretary to promulgate such standards without regard to the provisions of the Administrative Procedure Act.

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[14] Section 6(a) requires that:

> [w]ithout regard to [the Administrative Procedure Act] or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.

29 U.S.C. § 655(a).

A "national consensus standard" is:

> any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

29 U.S.C. § 652(9).

> The bill also provides for the issuance in similar fashion of those standards which have been issued under other Federal statutes and which under this Act may be made applicable to additional employees who are not under the protection of such other Federal laws. Such standards have already been subjected to the procedural scrutiny mandated by the law under which they were issued . . . .

S. Rep. No. 1282, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182.

Congress' concern that OSHA standards be subjected to certain procedural requirements is clear. Even during the short time period immediately after the enactment of the Act, the adoption of standards set by private organizations was permitted only where such standards met the definition of a national consensus standard, *i.e.*, promulgated in such a way that interested parties and diverse views were considered.

Moreover, Congress specifically noted that standards such as those adopted by ACGIH could not be considered "consensus" standards, and must be subject to rulemaking procedures before adoption by OSHA. An earlier Senate version of Section 6(a), in addition to providing for the summary adoption of national consensus and Federal standards, permitted OSHA to adopt, *by informal rulemaking*, standards established "by a nationally recognized standards-producing organization by other than a consensus method." [15] The Senate Report accompanying the bill clearly noted that a concern for procedural fairness was behind the requirement that such standards be subject to informal rulemaking. The Report stated:

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[15] S. 2193, 91st Cong., 2d Sess. 36 (1970). A House Bill would also have permitted adoption of "proprietary" standards under Section 6(a) after rulemaking procedures. H.R. 16785, 91st Cong., 2d Sess. 8 (1970). Thus, it is clear that, even during the time period immediately after OSHA's creation, when Congress' objective was to permit the rapid promulgation of Occupational Safety and Health Standards, proprietary standards such as those of ACGIH were required to be subjected to the procedural safeguard of full rulemaking proceedings.

> The Committee has also concluded that the Secretary should be able to make use of so-called proprietary standards which have been produced by various industrial and profesional groups, such as the American Conference of Governmental Industrial Hygienists . . . . However, since they were not adopted by their associations with the same procedural limitations applicable to consensus standards, the committee has provided that the Secretary must afford interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments before making such standards effective.

S. Rep. No. 1282, 91st Cong., 2d Sess. 6, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182. Thus, it is clear that Congress never intended that OSHA have the authority to adopt ACGIH Standards with no rulemaking even during the infancy of the Act. The fact that the final version of Section 6(a) rejects entirely the promulgation of non-consensus private standards further indicates Congress' view towards the adoption of ACGIH standards. Thus, OSHA's attempt to adopt automatically and with no rulemaking these same standards some eighteen years later flies in the face of the Act.

It is inconceivable that Congress, while specifically providing for the adoption by OSHA of national consensus standards of private organizations under Section 6(a), nonetheless intended OSHA to have this general power even after the specified time period of Section 6(a). Moreover, it is even clearer from the Act's legislative history that Congress did not intend such authority to extend to the adoption of private standards, such as those of ACGIH, which were not subject to at least some minimal procedural protections, such as those standards referenced in Section 6(a).

There is no contention that 29 C.F.R. § 1910.1200(d)(3) of the RHCS was adopted pursuant to Section 6(a). Therefore, it must be subject to the full rulemaking procedures of Section 6(b). Through the statute, Congress

sought to ensure that the conclusion of an outside source, like ACGIH, if not fitting the procedural and time requirements of § 6(a), would not be adopted without independent agency evaluation of the basis for those conclusions.[16]

Thus, OSHA's delegation of authority to ACGIH is contrary to the intent of Congress. OSHA's action is especially troubling because it represents a complete abdication of its duty to establish rules based on independent consideration and analysis of the evidence. Here, that statutorily-mandated function has been delegated to ACGIH.

Finally, by delegating its statutory duties to a nongovernmental third party, OSHA has dangerously circumvented the judicial review provisions of the OSH Act. Section 6(f) of the Act, 29 U.S.C. § 655(f), specifically provides for judicial review in the United States Court of Appeals of the determinations made by the Agency in promulgating a health or safety standard. By providing for such judicial review, Congress made clear that OSHA would not be the final arbiter concerning whether it has properly made the determinations required by the statute prior to enforcing its promulgated standards; this function was specifically assigned to the courts. However, by delegating to a private organization the authority to make these determinations on behalf of the Agency and by not including in the administrative record the evidence upon which the private organization based its de-

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[16] Even assuming that the time limitations and procedural requirements of Section 6(a) were satisfied, OSHA's adoption of ACGIH's determinations as set out in the RHCS would be impermissible. OSHA has not simply adopted the ACGIH TLV Table in effect at the time the RHCS was promulgated. Rather, it has delegated to ACGIH its authority to determine what chemicals are hazardous for purposes of the RHCS to ACGIH *in perpetuity*. In effect, OSHA has announced, years in advance of any consideration by ACGIH of the hazards associated with a particular substance, that it will adopt ACGIH's determination, without regard for the data supporting or criticizing that determination. This clearly exceeds any authority bestowed on the Agency by Congress.

terminations, the Agency effectively eliminates the judicial review provision of the Act.

A reviewing court cannot rule on the issue of whether the required determinations are supported by substantial evidence when the evidence which supposedly supports the determinations is not present in the record. Thus, if OSHA or any other agency is permitted to promulgate standards in the manner done in this case, not only will private organizations be entitled to make governmental decisions without the notice and comment requirements applicable to government agencies, such organizations' findings and determinations will be unreviewable by the courts. Private organizations, therefore, would have even more authority than the delegating agency itself. This result is repugnant to the Act as well as to general principles of administrative review and merits review by this Court.

B. Review Is Warranted to Address Whether the Constitution Permits the Delegation by an Agency of Rulemaking Authority to a Private Standards-Drafting Organization.

The United States Constitution vests all legislative powers in the Congress. U.S. Const. art. I, § 1. Congress, however, can delegate these powers to administrative agencies, if it provides sufficient policy standards to guide the agency's discretion. *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398-99 (1940). While modern precedent establishes that Congress may properly entrust agencies with broad legislative authority, it is still required that the agency itself exercise such power. *See, e.g., Population Institute v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986) ("[w]here Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority").

In this instance OSHA has adopted ACGIH's determinations without rulemaking or independent review. In essence, OSHA has subdelegated its delegated authority

to ACGIH. Moreover, OSHA has subdelegated this authority while providing ACGIH no policy standards to guide ACGIH's determinations. This subdelegation of authority violates Article I, § 1 of the United States Constitution. In order to address the permissibility of such agency delegations, Supreme Court review is warranted.

That Congress can delegate limited legislative authority to administrative agencies without violating fundamental principles of separation of powers is not now a matter of serious legal dispute. *See* K. Davis, *Administrative Law Treatise* § 3.1 (1978). Several circuits have held, for instance, that the delegation of authority from Congress to OSHA to regulate occupational health and safety was permissible because Congress adequately identified its policies and established specific standards to guide OSHA in performing its duties under the Act. *See Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1125 (7th Cir. 1978) ("[w]here a policy is declared and standards adequate to guide and test its execution have been articulated, the Congress cannot be said to have delegated its legislative functions") (citation omitted); *Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1257, 1263 (3d Cir. 1975) (and cases cited therein). *But see American Petroleum Institute*, 448 U.S. at 697-98 (Rehnquist, J., concurring) (OSH Act unconstitutionally delegated legislative authority to determine feasibility to OSHA).

However, OSHA's delegation of its rulemaking authority to ACGIH is a different matter. Delegations of legislative authority by Congress to agencies, and by agencies to private entities, are only permitted when the delegate is sufficiently guided by minimum standards, and when adequate governmental oversight or supervision is provided. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. at 398-99; *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *National Constructors Ass'n v. Marshal*, 581 F.2d 960, 972, n.32 (D.C. Cir. 1978); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977).

Where agencies have relied on private parties to set standards which are to be incorporated into agency rules, such delegations of authority have been upheld only when the agency retains the ultimate authority to decide the issue. For instance, in *National Constructors Ass'n*, a case factually similar to the instant case, an OSHA regulation governing temporary electrical systems at construction sites was challenged as an improper delegation of authority to a private party. The rule required that all such electrical systems be equipped with an approved device called a ground fault circuit interrupter (GFCI), and defined an acceptable GFCI as one that is "determined to be safe by a nationally recognized testing laboratory, such as, but not limited to, Underwriters' Laboratories, Inc. [UL]" 581 F.2d at 966-67. UL was apparently the only recognized laboratory that tested GFCI's. The D.C. Circuit held that "[w]hatever the merits of this [improper delegation] claim in general, we find it premature on the record before us. Because the Assistant Secretary [of Labor] reviewed and found 'suitable' all GFCI's that then bore the imprimatur of UL approval, . . . he retained control of the process, so that no subdelegation of final authority occurred." *Id.* at 972, n.32. The delegation was upheld only because the agency retained the ultimate supervisory power over the private group's determinations. The D.C. Circuit noted, however, that a serious question would be raised where, as is the case with OSHA and ACGIH, the private group's findings would automatically become law. *Id.*[17]

[17] Similar reasoning was employed by the Third Circuit in *Todd & Co.* In that case, it was contended that the SEC improperly delegated to a private organization the power to establish and enforce disciplinary rules for the over-the-counter securities market. Congress had authorized the SEC to register any organization which had adopted rules designed to prevent securities fraud and protect investors. The National Association of Securities Dealers (NASD), which had been registered by the SEC under this provision, fined and suspended the petitioners for violation of its disciplinary rules. The SEC affirmed the NASD's decision but reduced the penalty. The Third Circuit rejected the petitioners' contention

It is clear that in the instant case, OSHA provides no standards whatsoever to guide ACGIH in its scientific determinations, nor does it retain any power over ACGIH which could even remotely be characterized as final decisionmaking authority. No limits are placed (either by OSHA or Congress) on ACGIH's evaluation of chemicals for inclusion in its TLV Table. ACGIH is a fully independent entity. It operates free of the substantive and procedural obligations which restrict OSHA. Indeed, as regards the Chemical Substances TLV Committee, ACGIH actually has no published procedures or guidelines concerning adoptions or modifications of TLVs for covered substances. In short, ACGIH generates its TLV Table behind closed doors; ACGIH has absolutely no obligation to be responsive to public comment or to the views of anyone outside of its own privately selected membership. ACGIH is not required to comply with either the substantive or the procedural requirements of the OSH Act. OSHA provides neither direct supervision of ACGIH nor minimum standards by which ACGIH must operate.

In addition, when ACGIH establishes in the future a TLV for any substance, it will *automatically*, with no consideration by OSHA, become subject to the RHCS. OSHA has no mechanism in place in the RHCS by which it will receive notice of changes to the ACGIH TLV Table. There is no procedure by which OSHA will evaluate or review those changes. Thus, OSHA has delegated to ACGIH totally and completely its statutory responsibility to determine whether substances constitute a significant risk. In such a case, important constitutional issues of agency accountability are raised, and review by this Court is warranted.

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that the statute unconstitutionally delegated legislative power to a private institution. It found that the SEC retained the final decisionmaking authority because it had the power to approve or disapprove the NASD's rules, and because it had the authority to review the NASD's decision and make de novo findings of fact, if necessary. 557 F.2d at 1012. *See also First Jersey Securities, Inc.*, 605 F.2d at 697.

II. WHETHER PETITIONERS WERE DEPRIVED OF THEIR STATUTORY RIGHT TO BE HEARD CONCERNING THE CONTENT OF AN OCCUPATIONAL SAFETY AND HEALTH ACT STANDARD REGULATING THEIR ACTIVITIES BY THE LOWER COURT, WHICH DIRECTED THE AGENCY TO APPLY THE STANDARD TO THEM BUT WHICH ALSO MANDATED THAT THE AGENCY DISREGARD THE PROCEDURAL REQUIREMENTS OF ITS ENABLING LEGISLATION.

The lower court's instant decision together with its related decisions concerning the Standard make abundantly clear that the court first took away the rulemaking function from the Agency and then required OSHA to act in contravention of its enabling legislation. In short, the lower court considered the entire rulemaking proceeding one which it controlled.

Section 6(b) of the OSH Act prescribes the procedures which OSHA must follow when it promulgates, modifies, or revokes any occupational safety and health standard. Section 655(b)(2) provides in pertinent part:

> The Secretary shall *publish* a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments (emphasis supplied).

The procedures established by Section 6(b) obligate OSHA to publish in the Federal Register the proposed rule, about which interested persons may comment and on which public hearings may be held, whenever OSHA seeks to make substantive revisions to an existing standard. *See Cleveland Aluminum Casting Co. v. Secretary of Labor*, 12 OSHC 1817, 1818 (BNA) (D.C. Cir., Docket No. 85-1286, April 23, 1986); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 585 (D.C. Cir. 1985); *Marshall v. Pittsburgh-Des Moines Steel Co.*, 584 F.2d 638 (3d Cir. 1978); *see also* 29 C.F.R. § 1911.5 (regulation interpreting Section 6(b) to

permit making of "minor rules or amendments in which the public is not particularly interested without the notice and public comment procedure which is otherwise required"). For most federal agencies, the Administrative Procedure Act, 5 U.S.C. § 553(b), similarly requires the publishing of a notice of a proposed rule. The notice must provide enough detail so that interested parties have the opportunity to provide informed criticism and comments. *See AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985).

In USWA I, the Court determined that the HCS should be extended to industries outside the manufacturing sector. Since OSHA made it clear in the proposed HCS that the standard was limited to the manufacturing sector, industries in non-manufacturing sectors did not participate in the determination. Indeed, as they were not affected by the HCS, they did not have the right to participate in the litigation of the standard. *See Fire Equipment Mfrs. Ass'n v. Marshall*, 679 F.2d 679 (7th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

Pursuant to the lower court's decision in USWA I, OSHA initiated the gathering of additional information for the record relevant to fulfilling its statutory obligations as interpreted by this Court in *American Petroleum Institute* and *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490 (1981). The Agency began this process by issuing an Advance Notice of Proposed Rulemaking ("ANPR"). 50 Fed. Reg. 48,794. The ANPR clearly was not a substitute for the publication of a proposed standard nor was it intended to be so by OSHA. The Agency sought simply to use the information provided in response to the ANPR to draft a proposed standard that would extend to non-manufacturers, which it understood it was required to do by the OSH Act. However, the lower court in USWA II refused to permit OSHA to publish a proposed standard and, over OSHA's objections, required the Agency to promulgate a final standard extending the HCS to non-manufacturers. As a result, the RHCS was promulgated without the required notice and

comment procedural safeguards to ensure that affected parties could adequately respond with their respective concerns.

In its decision below, the court ignored this violation of the notice and comment provisions of the Act, and limited its discussion to its belief that the proposed HCS Standard was sufficient to notify non-manufacturers that comments should be filed on the scope of the Standard's application. This conclusion was reached despite the fact that the proposed Standard specifically limited its application to the manufacturing sector. Regardless of the lower court's curious interpretation of the proposed HCS, the court's observations do nothing to reduce OSHA's obligation to publish proposed standards which include major modifications from earlier proposals. Clearly, extension of the HCS to non-manufacturers constituted a major modification of the Standard. OSHA understood its statutory duties and attempted to conform to them. The court below, however, refused to allow compliance. In so doing, the decision of the court below was in error and in direct conflict with cases in other circuits dealing with the notice and comment provisions. *See, e.g., Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980).[18]

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[18] The court below also failed to recognize that the RHCS included substantive provisions other than the scope of its application, which were not published as proposed modifications to the HCS and therefore were not subject to appropriate comment by affected industries. For instance, the grain industry is particularly affected by OSHA's substantive revision of the definition of "chemical manufacturer." In the HCS, OSHA placed the primary burden of determining the hazards of chemicals on the chemical manufacturer and importer. "Chemical manufacturer" was defined as: "an employer in SIC Codes 20 through 39 [the manufacturing industries] with a work place where chemical(s) are produced for use or distribution." 29 C.F.R. § 1910.1200(c) (1986). Thus, by definition, OSHA ensured in the HCS that the persons charged with the burdens of hazard determination were "manufacturers" of the subject chemicals.

The RHCS, however, redefines "chemical manufacturer" by removing the reference to SIC Codes 20 through 39. 52 Fed. Reg.

Thus, the record indicates that the court below ignored OSHA's statutory responsibilities and was driven by its own sense that the standard was necessary regardless of procedural fairness and the dictates of the OSH Act. If the lower court's decision is left to stand, industry groups, if they have the resources, will be required to file comments on each and every proposed standard regardless of the clearly stated scope of the standard, or risk a determination that they waived their right to comment if the standard is later expanded to apply to them. Indeed, OSHA or any other agency, could effectively circumvent the notice and comment provisions by requesting comments on the possible scope of all proposed standards, regardless of the explicit limitations of scope contained in the proposed standards. This scenario was not intended by Congress and directly violates the language of Section 6(b) as well as numerous decisions of other circuits. For this reason, review by this Court is warranted.

31,852, 31,878. Thus, the RHCS deleted the requirement that the "chemical manufacturer" be a "manufacturer" at all. (There is also no requirement that a "chemical" be a "chemical." Grains are foods, and by no stretch of the imagination can they be considered chemicals. Nevertheless, grain dust is a "chemical" under the RHCS).

Soon after the RHCS was published, OSHA informally notified NGFA that the Agency interpreted the term "chemical manufacturer" to include the grain handling industry (which is generally classified in SIC 5153). Thus, the smallest country elevator, which does no more than receive grain from the farmer, is charged with the responsibility of providing labels to downstream purchasers and evaluating the scientific literature to determine what information about grain dust must be provided on an MSDS to purchasers of the grain and to employees. This interpretation is a significant deviation from the HCS. Because OSHA was forced to disregard the notice and comment requirements of Section 6(b), the grain elevator industry was completely precluded from any opportunity to inform OSHA of its concerns regarding the impact that the amendment to the definition of "chemical manufacturer" might have on the industry.

III. WHETHER THE LOWER COURT'S FAILURE TO REQUIRE OSHA TO DEMONSTRATE THAT A SIGNIFICANT RISK EXISTS IN EACH REGULATED INDUSTRY CONFLICTS WITH THE OCCUPATIONAL SAFETY AND HEALTH ACT AND HAS CREATED A CONFLICT WITHIN THE CIRCUITS.

Section 3(8) of the Act, 29 U.S.C. § 652(8), requires that OSHA show that each provision of a new standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This Court has interpreted this provision to require that OSHA show that the standard reduces a "significant risk" to employees. *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (striking down a portion of OSHA's cotton dust standard because OSHA failed to show that each specific provision reduced a significant risk to employees); *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 662 (1980) (plurality opinion) (invalidating OSHA's benzene standard because the Agency failed to adequately explain how the standard would reduce or eliminate significant risk to employees).

In the instant case, the court below deviated from the decisions of this Court and held, with no citation to any authority, that because the RHCS is a "performance-oriented information disclosure standard" the significant risk requirement "must of necessity be satisfied by a general finding *concerning all potentially covered industries.*" Pet. App. 13a (emphasis supplied). This holding not only is inconsistent with Supreme Court precedent, it also creates a sharp conflict within the circuits. In *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980), for example, the Fifth Circuit struck down OSHA's cotton dust standard because the Agency attempted to base a standard regulating the ginning industry upon studies of acute health effects of cotton dust exposure in cotton manufacturing industries. Rejecting the Agency's approach, the Fifth Circuit ruled that OSHA could not use risk data obtained in one industry to regulate another industry where working con-

ditions were not the same. This same acknowledgement that the significant risk finding must be made on an industry-by-industry basis has been emphasized by other courts as well. *See, e.g., United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1455 (4th Cir. 1985) (en banc).

Thus, decisions of this Court and other circuits have held that OSHA cannot assume that significant risks present in one industry are also present in another industry. Indeed, this Court has already counselled the Agency that findings of significant risk required by the Act cannot be substituted with agency assumptions. *See Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. at 662. Thus, the decision below which permits OSHA to make just such an assumption warrants review by this Court.[19]

IV. WHETHER THE LOWER COURT'S FAILURE TO REQUIRE OSHA TO DEMONSTRATE THAT THE REVISED STANDARD IS FEASIBLE FOR EACH REGULATED INDUSTRY CONFLICTS WITH SECTION 6(b) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT AND HAS CREATED A CONFLICT WITHIN THE CIRCUITS.

Section 6(b)(5) of the Act requires that any standard promulgated thereunder must be feasible. The burden of

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[19] The lower court also cryptically suggests that not only is OSHA not obligated to make significant risk findings for each regulated industry, but because the RHCS is a "performance-oriented information disclosure standard" the Agency does not even have to make significant risk findings for each substance regulated by the standard. Pet. App. 13a. This holding is clearly at odds with the decisions of this Court and other circuit courts. *See, e.g., American Textile Mfrs. Institute v. Donovan*, 452 U.S. at 540 (requiring that OSHA show that exposure to cotton dust presents a significant risk); *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. at 662 (requiring that OSHA show that exposure to benzene represents a significant risk); *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d at 413 (requiring that OSHA show that exposure to cotton dust represents a significant risk).

showing feasibility rests with OSHA. *United Steelworkers of America v. Marshall*, 647 F.2d at 1265 (the issue at hand is not to determine whether a petitioner has proven that the standard will be infeasible; rather, OSHA must affirmatively "prove feasibility"); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d at 1452 (OSHA must determine whether the standard is both technologically and economically feasible). Further, as in the case of a significant risk determination, a finding of feasibility must be made on an industry-by-industry basis. *See United Steelworkers of America v. Marshall*, 647 F.2d at 1274, 1277-1310; *AFL-CIO v. Marshall*, 617 F.2d 636, 669 (D.C. Cir. 1979), *aff'd in part, vacated in part and remanded*, 452 U.S. 490 (1981); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d at 1452.

The lower court held that "[a]s this court's remand [in USWA I and II] required, the Secretary examined the same [1982 HCS] rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector." Pet. App. 14a. The court, therefore, required not that OSHA affirmatively prove that the standard was feasible for each industry regulated, but that the petitioners be required to prove infeasibility in order to have the standard set aside. This holding is inconsistent with both the Act and interpretative decisions of other circuits. Further, as noted above, OSHA was prevented by the court below from gathering information to supplement the record generated in promulgating the HCS (which was limited to the manufacturing sector) to demonstrate the feasibility of extending the HCS to non-manufacturers. Thus, the record does not support the feasibility of the RHCS on an industry-by-industry basis. This result, which was mandated by the court below, again is inconsistent with the Act as interpreted by various courts of appeal as well as the Agency and merits review by this Court.[20]

[20] Indeed, the Agency itself recognized that it was being required to violate the Act:

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully request this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Date: February 21, 1989

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> Courts reviewing OSHA standards establishing exposure limits for toxic substances have ruled that the secretary should establish feasibility on an industry basis and that a determination of economic feasibility requires a finding as to the established cost of the standard to the industry and its effect on the industry's long-term profitability. *See ATMI, . . . United Steelworkers of America v. Marshall* (lead) 647 F.2d 1189, 1172 (D.C. Cir. 1981); *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1452-53 (4th Cir. 1985) (en banc).
>
> * * * *
>
> The panel, moreover, has apparently shifted the burden of proof onto the proponents of nonfeasibility or at least has improperly lowered the burden the secretary bears to establish the feasibility of the standard . . . . Placing a burden on the Secretary to demonstrate infeasibility would be contrary to precedent.

OSHA Pet. Rehearing in USWA II at 8, 11-12. Thus, the decision below is inconsistent with OSHA's own interpretation of the Act.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO,

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR

Argued: September 16, 1988
Before: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed: November 25, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Before the court are four petitions for review of the revised hazard communication standard promulgated by the Secretary of Labor pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (OSH Act). The petitioners are the Associated Builders and Contractors, Inc. (ABC), the National Grain & Feed Association, Inc. (NGFA), the Associated General Contractors of Virginia, et al. (AGC), and United Technologies Corporation (UTC). These petitions were initially filed in the District of Columbia Circuit, the Second Circuit, and the Fourth Circuit. Since the filing in the District of Columbia Circuit was earliest, the other petitions were transferred and consolidated there. Thereafter, the Building and Construction Trades Department, AFL-CIO intervened, and on the motion of the intervenors the petitions were transferred to this court. The transfer order was made because the hazard review standard was before this court on three prior occasions. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). Because those prior decisions are controlling, we will deny the petition for review.

I.

In USWA I this court ordered the Occupational Safety and Health Administration (OSHA) to apply its recently promulgated hazard communication standard not only to the manufacturing sector, but to the non-manufacturing sector as well, unless the agency could "state reasons

why such application would not be feasible." 763 F.2d at 739. Except for a part of its treatment of trade secrets, the hazard communications standard was otherwise upheld. 763 F.2d at 743.

In *USWA II*, the petitioners in *USWA I* returned to the court seeking to enforce the judgment in that case. OSHA, following the *USWA I* judgment, had issued a notice of proposed rulemaking, claiming that the record was insufficient to determine the issue of feasibility of the standard outside the manufacturing sector. This court held that OSHA was not in compliance with the *USWA I* judgment, which did not contemplate notice and comment. It ordered OSHA to promulgate, within 60 days, a hazard communications standard applicable to all workers covered by the OSH Act, or state reasons separately, as to each category of excluded workers, why, on the basis of the present administrative record, a hazard communication standard is not feasible. 819 F.2d at 1270.

In *USWA III* the original petitioners moved for further relief in enforcement of the *USWA I* judgment. By then OSHA had on August 24, 1987, published an expanded hazard communication standard applicable to all industries. 52 Fed. Reg. 31852 et seq. (codified at 29 C.F.R. § 1910.1200). This revised standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). OMB, ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. § 3506 et seq. (Supp. 1988), sought public notice and comment "on the recordkeeping, notifications, and other paperwork requirements of the revised standard." 52 Fed. Reg. 36652. Following a public hearing OMB purported to disapprove three provisions which the revised standard adopted. These three new provisions were: (1)

a requirement that at multi-employee worksites employers exchange Material Safety Data Sheets obtained from chemical manufacturers, 29 C.F.R. § 1910.1200 (e)(2); (2) an exemption from the labeling requirements of the standard for consumer products used in the same manner and qualities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). This court held that the regulations disapproved by OMB did not involve the collection of information within the meaning of the Paperwork Reduction Act. 855 F.2d at 113. Summarizing the prior history of the case, we noted:

> In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved

> by OMB was accordingly inconsistent with those orders. Relief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *USWA II*, 819 F.2d at 1270.

855 F.2d at 113-14.

II

The present petitioners, unlike those who were the moving parties in *USWA I*, *II*, and *III*, seek to prevent enforcement of the hazard communication standard. Their objections include both procedural and substantive challenges to the promulgated standard.

A.

Sufficiency of Notice of Rulemaking

The four petitioners contend that OSHA violated section 6(b) of the OSHA Act, 29 U.S.C. § 655(b), by failing to provide adequate notice of proposed rulemaking affecting their industries. That contention is foreclosed by *USWA II*, which exhaustively detailed the fact that the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding. The court wrote:

> On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous material labeling." *Id.* at 5,373. Among the topics on which comments were requested was

> "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendation, was addressed to all employers, not only to employers in the manufacturing sector.

819 F.2d at 1265. In the same opinion, this court recognized that the 1982 notice was at least as explicit. That notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included. *Id.* at 1266. Thus this court's holding that the Secretary provided adequate notice to all employers was clearly stated.

The four petitioners urge that since they were not parties to the initial petition for review, they are not bound by the prior panel decision. OSHA, on the other hand, contends that the discussion of the notice of rulemaking in *USWA II* is law of the case. We need not resolve that difference, however, because in any event the facts with respect to the 1981 and 1982 notices have not changed, and a prior panel has applied the law to those facts. Thus *USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, 8C. Nor are we of such a mind. The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected.

B.

The Significant Risk Finding

Several of the petitioners contend that the hazard communication standard is invalid because it was promulgated without a significant risk determination. Under

Section 3(8) and 6(b)(5) of the OSH Act, 29 U.S.C. §§ 652(8), 655(b)(5), the Secretary must determine that there exists a significant risk of harm to employees and that a standard is reasonably necessary or appropriate to reduce that risk. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980) (plurality opinion).

The agency record on this issue was reviewed by this court in USWA I. The court upheld OSHA's finding that a section 6(b)(5) standard is required to address a significant risk to workers. 763 F.2d at 735. The significant risk finding applied to all workers who would be exposed to hazardous chemicals. *Id.* at 738. Indeed, the court noted the incongruity of protecting spray painters, for example, in the manufacturing sector, but not in construction. *Id.* at 737.

The agency record on this issue was reviewed once again in *USWA II*. In that case we ordered OSHA, on remand, to consider solely the feasibility of the standard outside the manufacturing sector, not to reestablish its need. 819 F.2d at 1270. As with the treatment of the notice issue in *USWA I* and *USWA II*, the record on the significant risk issue is unchanged, and this panel is not free to disregard the holdings in those prior opinions of the court.

Petitioners, ABC, AGC, and NGFA, contend that those opinions did not address their specific contention, that OSHA must make a significant risk determination separately for each industry: in this case, construction and grain processing or storage. We do not interpret the opinions so narrowly. The standard was approved for the manufacturing sector, which has twenty major Standard Industrial Classification (SIC) Code subdivisions. There is no more obvious need for industry specific significant risk determinations for the construction and grain industries than for subdivisions of the manufacturing sector. The holdings in USWA I and USWA

II sustained a general significant risk finding. Assuming, however, that those opinions were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different. This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible. We reject, as well, the contention by ABC and AGC that because the construction industry already provides training in hazardous materials handling, there is no significant risk in that industry. As best that argument establishes the existence of risks, and the requirement for maintenance on the jobsite of information on those risks can only make the existing training more effective. As to risks posed by grain dust, the propensity of grain elevators to blow up has been well documented.

C.

The Feasibility Determination

Several petitioners contend that the Secretary's feasibility determination, made after the remand in USWA II, is not supported by the rulemaking record. Unlike the notice of rulemaking and significant risk issues, the feasibility determination, outside the manufacturing sector, has not previously been addressed by this court. Our review of that determination asks whether "the Secretary carried out [her] essentially legislative task in a manner reasonable under the state of the record before [her]." *Synthetic Organic Chemical Mfrs. Ass'n v. Bren-*

nan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (quoting *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974)).

When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. The Secretary had, prior to our remand in *USWA I*, already established that the employee training and the maintenance of labels and material safety data sheets is feasible in the manufacturing sector, encompassing a spectrum of SIC Code subdivisions with employers of all sizes. As this court's remand required, the Secretary examined the same rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector. That conclusion is on the agency record completely supportable, and we are not permitted to substitute our legislative judgment for that of OSHA. If there are deficiencies in that record they may not be laid at OSHA's door, for as we hold in Part II A above, the affected employers received notice of the rulemaking proceeding.

D

The Unlawful Delegation Contention

One final substantive challenge to the hazard communication standard is advanced on behalf of NGFA, which contends that OSHA unlawfully delegated its rulemaking authority to the American Conference of Government Industrial Hygienists (ACGIH) when OSHA incorporated in the standard that organization's Threshold

Limit Values for Chemical Substances and Physical Agents in the Work Environment. ACGIH is an impartial scientific organization which identifies safe exposure levels for various substances.

This court in *USWA I* decided the delegation question when it held, over the objections of the petitioner Public Citizens, and the State of New Jersey as *amicus*, that OSHA need not itself evaluate specific chemical hazards, but could rely on information developed by chemical manufacturers. 763 F.2d at 739. The reliance on ACGIH is an *a fortiori* case, and *USWA I* controls. Even if it did not control, we would in any event reject the unlawful delegation contention. It was appropriate to adopt ACGIH's list as a floor, while imposing on chemical manufacturers the requirement that they research and assess hazards independently. 29 C.F.R. § 1910.1200 (d)(3). That action was fully consistent with section 6(b)(5) of the OSH Act, which directs OSHA to set toxic substance standards based on "the best available evidence" with due consideration to "the latest available scientific data."

III

None of the substantive or procedural challenges to the application of the hazard communication standard to the construction or grain processing and storage industries have merit. The petitions for review of ABC, AGC, and NGFA will therefore be denied. The stay of those standards granted by a panel of this court on June 24, 1988, shall be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO,

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ORDER AMENDING OPINION

The slip opinion in the above matter, filed November 25, 1988, is hereby amended as follows. The penultimate sentence of section III on page 16 should read: "The petitions for review of ABC, AGC, NGFA, and UTC will therefore be denied."

/s/ John J. Gibbons
Chief Judge

Dated: December 5, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)
United Technologies Corporation, Associated General

Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

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THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

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No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO,

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF THE REVISED HAZARD COMMUNICATIONS STANDARD PROMULGATED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Present: GIBBONS, *Chief Judge,* HUTCHINSON and SCIRICA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Occupational Safety and Health Administration, United States Department of Labor and were argued by counsel September 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review of the revised hazard communication standard promulgated by the said Administration and published at 52 Fed. Reg. 31852, et seq. (August 24, 1987), be, and the same are hereby denied. It is further ordered that the stay of the said standard granted by a panel of this Court on June 24, 1988 is vacated. Costs taxed against the petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

November 25, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association,
Intervenors.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association,
Intervenors.

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THORNE G. AUCHTER, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 18, 1985

Decided May 24, 1985

Before GIBBONS, Circuit Judge, and FISHER, Chief Judge* and KELLY, District Judge**

OPINION OF THE COURT

GIBBONS, Circuit Judge:

This case involves consolidated petitions for judicial review of the Hazard Communication Standard promulgated by the Secretary of Labor on the authority of the Occupational Safety and Health Act of 1970 (OSH Act),[1] Pub.L. 91-596, 84 Stat. 1590, 92 U.S.C. § 651 *et*

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] Petitions for judicial review of the standard were filed on November 22, 1983, in this Court by the United Steelworkers of America, AFL-CIO, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions so intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit (No. 84-1063; Jan. 24, 1984);

seq. (1982). Certain intervenors challenge our jurisdiction to consider the petitions pursuant to 29 U.S.C. § 655(f) (1982), contending that the action under review is a regulation rather than a standard. Petitioners and the Secretary urge that we have jurisdiction. Petitioners and intervenors challenge the standard on several substantive grounds, while the Secretary defends it. We conclude that the petitions for review are properly here, and thus address the substantive challenges.

I.

Evolution of the Standard

Section 6 of the OSH Act directs the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b) and 655(b)(1) (1982). Any standard promulgated by the Secretary

> shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7) (1982).

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the State of New York in the Second Circuit (No. 83-4220; Dec. 20, 1983); the State of Illinois in the Seventh Circuit (No. 84-1111; Jan. 23, 1984); the Flavor and Extract Manufacturers' Association in the Fourth Circuit (No. 83-2151; Dec. 12, 1983); and the Fragrance Materials Association in the District of Columbia Circuit (No. 84-1021; Jan. 18, 1984). These cases were subsequently transferred to this Court and consolidated in this proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association have since been withdrawn.

In 1974, the National Institute for Occupational Safety and Health (NIOSH), an agency created by section 22 of the OSH Act, 29 U.S.C. § 671 (1982), recommended that the Secretary promulgate a standard requiring employers to inform employees of potentially hazardous materials in the workplace. 47 Fed.Reg. 12095 (1982). Later that year the Secretary appointed an advisory committee to develop standards for implementation of the statutory provision requiring labels or other appropriate forms of warning. That advisory committee issued its report on June 6, 1975, recommending a classification of hazards, the use of warning devices such as labels and placards, disclosure of chemical data, and employee training programs. *Id.* at 12096.

The 1975 Committee report did not result in prompt action by the Secretary. In 1976 a House of Representatives subcommittee held oversight hearings during which several committee members expressed concern over the Secretary's failure to promulgate a comprehensive Hazard Communication Standard. *Control of Toxic Substances in the Workplace: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 94th Cong. 2d Sess. 87, 89-90 (1976). Seventeen months later, the full House Committee on Government Operations issued a Report which criticized the agency for "miserly use of its delegated powers to deal with disease and death-dealing toxic substances." House Comm. on Government Operations, *Failure to Meet Commitments Made in the Occupational Safety and Health Act*, H.R.Rep. No. 710, 95th Cong., 1st Sess. 13 (1977). The Committee concluded that:

> The Department of Labor should exercise its power under the Occupational Safety and Health Act to insure that employers and workers can and will know what kinds of toxic dangers are present in the Nation's workplaces. OSHA should require chemical

> formulators to identify any regulated substance in products they sell.

Id. at 15.

Eventually, on January 16, 1981, the agency published a notice of proposed rulemaking entitled "Hazards Identification." 46 Fed.Reg. 4412-53. The standard proposed would be applicable to employers in Division D, Standard Industrial Classification Codes 20-39, which include only employers in the manufacturing sector. *Id.* at 4426. This classification of employers is made by type of activity for the purpose of promoting uniformity and comparability in the presentation of statistical data. Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual 9* (1972). This initial proposal was withdrawn by the Secretary on February 12, 1981, for further consideration of regulatory alternatives. 46 Fed.Reg. 12214. The notice of proposed rulemaking which resulted in the rule challenged in the instant proceedings, entitled "Hazard Communication," was published on March 19, 1982. 47 Fed.Reg. 12091. Like the January 16, 1981 proposal, it was limited to employers in the manufacturing sector. The most significant difference from the rule proposed in 1981 was the inclusion in the March 19, 1982 proposal of a trade secret exception to the requirement that the chemical identities of all hazardous chemicals be disclosed. *Compare* 46 Fed.Reg. 4426 (1981) *with* 47 Fed.Reg. 12105 (1982).

The standard was published in its final form on November 25, 1983. 48 Fed.Reg. 53279. It requires that chemical manufacturers and importers "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200 (d)(1) (1984). It refers to several compilations of toxic materials. These lists establish a floor of toxic substances which chemical manufacturers or importers must treat as

hazardous. 29 C.F.R. § 1910.1200(d)(3) (1984). Chemicals not included in the designated compilations must be evaluated for hazardousness by reference to "available scientific evidence." 29 C.F.R. § 1910.1200(d)(2) (1984). A manufacturer or importer of chemicals found to be hazardous must "ensure that each container . . . leaving the workplace is labeled" with the chemical identity, with appropriate hazard warnings, and with the name and address of the source. 29 C.F.R. § 1910.1200 (f)(1) (1984). Manufacturers or importers must also prepare a "material safety data sheet" (MSDS) containing the chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 29 C.F.R. § 1910.1200(g) (1984). The MSDS must be provided to each employer in the manufacturing sector (Standard Industrial Classification Codes 20-39) purchasing a hazardous chemical. That employer must in turn make the MSDS available for employee inspection, 29 C.F.R. § 1910.1200(g)(8) (1984), and "shall provide employees with information and training on hazardous chemicals in their work area . . ." 29 C.F.R. § 1910.1200 (h) (1984).

The rule allows an exception from the labeling and MSDS ingredient disclosure requirements when a chemical manufacturer or importer claims that the chemical identity is a trade secret. 29 C.F.R. § 1910.1200(i) (1984). In such a case, the manufacturer or importer must provide a MSDS disclosing the hazardous properties of the chemical and suggesting appropriate precautions. In the case of a medical emergency, the manufacturer or importer must disclose the chemical identity to a treating physician or nurse, and may later require such a health professional to sign a confidentiality agreement. 29 C.F.R. § 1910.1200(i)(2) (1984). Absent a medical emergency, the manufacturer or importer may be required to disclose the chemical identity to a health professional who makes a written request detailing the

occupational need for the information, and who is willing to sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3) & (4) (1984). In no case is the manufacturer required to disclose the precise formula, as opposed to the identity of chemicals in the compound.

The rule provides expressly that:

> [t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

29 C.F.R. § 1910.1200(a)(2) (1984). Thus, at least insofar as they might require hazard communication to employees in the manufacturing sector, state hazard disclosure laws are claimed to be preempted by the rule.

II.

Jurisdiction Under Section (6) of the OSH Act

Congress has in section 6 of the OSH Act authorized the Secretary to issue health and safety standards. 29 U.S.C. § 655 (1982). In section 8(c)(3) of the Act, Congress also authorized the Secretary to issue regulations requiring employers to keep records and inform employees of worker exposure to potentially toxic materials or harmful physical agents. 29 U.S.C. § 657(a)(3) (1982). Classification of the Hazard Communication Standard as a section 6 standard or a section 8 regulation will have two interrelated consequences.

First, Congress has vested in the courts of appeals jurisdiction over challenges to the validity of section 6 standards. 29 U.S.C. § 655(f) (1982). Congress has made no such decision with respect to judicial review of section 8 regulations. These are reviewable in the district courts pursuant to the Administrative Procedure Act.

5 U.S.C. § 703 (1982). Thus if the Hazard Communication Standard is a section 8 regulation the only course open to us would be to transfer the petitions for review to an appropriate district court. 28 U.S.C. § 1631 (1982). A court of appeals would reach the merits of a dispute over a regulation, therefore, only on an appeal from a judgment of the district court.

Second, by whatever route the case arrived in a court of appeals, whether the challenged rule is a section 6 standard or a section 8 regulation affects its preemptive effect on state law. Section 18(a) of the OSH Act provides explicitly:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a) (1982). If, however, a section 6 standard has been adopted, the role of the states is circumscribed by section 18(b) which provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (1982). The Secretary must accept such a state plan if it "will be at least as effective in providing safe and healthful employment" as the OSHA standards. 29 U.S.C. § 667(c)(2) (1982).

The intervenor states all have hazard disclosure laws which, if not preempted, would be operative in the manufacturing sector. None contend, however, that they have

submitted and have obtained approval of their plans pursuant to section 18. Given the explicit language of sections 18(b) and (c), the conclusion is inescapable that if the rule in issue is a section 6 standard it preempts state law until a state obtains section 18 approval of a state plan. It is not likely that the states challenging the rule will seek such approval, for section 18 contemplates that if they do so, they take on the fiscal burdens of enforcement now borne by the United States. 29 U.S.C. § 667(c)(5) (1982).

Since the disclosure requirements of laws adopted by the intervening states are in several respects stricter than those adopted by the Secretary, it is not surprising that those states would have us classify the challenged rule as a section 8 regulation rather than a section 6 standard. The preemptive effect of a section 8 regulation is not dealt with explicitly in the OSH Act, and any implied preemption would require a finding that is impossible to comply with both federal and state law, or that "the state law stands as an obstacle to the accomplishment and the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). It is not likely that we could make either such finding.

The agency decision to include in its rule an express provision preempting state law would, if the rule is a section 8 regulation rather than a standard, be reviewable pursuant to the Administrative Procedure Act. *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). The Secretary's inclusion of an express reference to preemption in the manufacturing sector appears to have been motivated at least in part by the desire to reduce the regulatory burden posed by multiple state laws. 48 Fed. Reg. 53284 (1983). That purpose is arguably at odds with congressional intention that the OSH Act provide

a federal floor for safety in the workplace. Reduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not. Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, Pub.L. No. 91-596, at 144, 413, 444 (1971). We need not, however, decide whether preemption would be implied, or whether the preemption provision of the rule itself is valid as a section 8 regulation, if we conclude that the rule is a section 6 standard, for, as noted above, such standards are explicitly preemptive under the statute.

The Act provides no definition of the term "regulation." The term "occupational safety and health standard" is defined as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8) (1982). This definition is not helpful in the task of differentiating between standards and regulations for it can hardly be said to exclude the dictionary definition of the term regulation.

The states urge that the difference between section 6 standards and section 8 regulations must be determined by looking at the separate purposes behind the two provisions. Section 6 standards, they urge, serve two purposes: (1) to improve safety in the workplace by removing specific and already-identified hazards; and (2) to provide objective criteria capable of immediate application. Section 8 regulations, they urge, are designed, not for the elimination of specific and already-identified haz-

ards, but for such purposes as the facilitation of investigation and enforcement. The states place principal reliance, in this regard, upon *Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 782-83 (5th Cir.1981), in which the court classified the agency's Records Access rule as a section 8 regulation. The court in *Louisiana Chemical Association* held that before proceeding to the merits of a section 6(f) petition for review it must determine "whether the challenged rule reasonably purports to correct a particular 'significant risk' or instead is merely an enforcement or detection procedure designed to further the goals of the Act generally." *Id.* at 782. It concluded that the Records Access rule was a section 8 regulation.

The quoted distinction provides a convenient test for identifying standards, which this rule satisfies. While both the Records Access rule and the Hazards Communication rule have in common the object of communicating hazard information to employees, the former only provides for access to records maintained by an employer for other purposes, while the latter is aimed at eliminating the specific hazard that employees handling hazardous substances will be more likely to suffer impairment to their health if they are ignorant of the contents of those substances. The Secretary found that inadequate communication is itself a hazard, which the standard can eliminate or mitigate. 48 Fed.Reg. 53321 (1983). *See also* 48 Fed.Reg. 53282-83, 53323-24, 53327-29 (1983).

The State of New York urges that a communication rule can never be a standard, because it does not provide for dimunition of risk through improved protection or reduced exposure. The Secretary found, however, that risk of harm can be greatly reduced by direct warning to employees, who are in the best position to assure that dangerous substances are handled in the safest possible manner. 47 Fed.Reg. 12112. Moreover New York's in-

terpretation of section 6 is inconsistent with the inclusion therein of the direction to the Secretary to promulgate standards which "prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed. . . ." 29 U.S.C. § 655(b)(1) (1982). Finally, while we exercise independent judgment as to the distinction between a section 6 standard and a section 8 regulation, the interpretation of those provisions of the OSH Act by the agency charged with its implementation should be afforded some degree of deference. The Secretary has classified the rule as a standard, and urges that the petition for review is properly here.

We conclude, therefore, that the Hazard Communication Standard is a section 6 standard reviewable in this court pursuant to section 6(f).

III.

Preemption of State Hazard Communication Rules in the Manufacturing Sector

Our analysis of the jurisdictional issue disposes of the states' objection to preemption of their hazard disclosure laws with respect to employees in the manufacturig sector. The Hazard Communication Standard, to the extent it is valid, as a section 6 standard, applies to the exclusion of state disclosure laws which have not been approved in accordance with section 18.

Massachusetts, Illinois, New Mexico, and West Virginia raise the question whether the federal Hazard Communication Standard operates to preclude state laws outside the manufacturing sector. The Secretary does not contend that the Standard has such an effect. 48 Fed.Reg. 53284; Respondent's Brief at 84-89. He urges, as well, that the issue of the standard's operation outside that sector is not ripe for review. To the extent

that the states seek a declaration that their hazard disclosure laws may operate outside the manufacturing sector, we agree that it would be premature to make such a declaration in this case. The Secretary does not urge that they may not so operate, but other parties not before us might present reasons, such as unseverability as a matter of state law, which have not been litigated before this court. We hold only that, to the extent it is valid, the federal Hazard Communication Standard preempts state hazard disclosure laws with respect to disclosure to employees in the manufacturing sector.

IV.

Challenges to Validity of the Standard

A. Scope of Review

Petitioners' challenges to the validity of the standard present three issues: (1) its limited application to the manufacturing sector; (2) the failure to adopt as a list of hazardous substances the Registry of Toxic Effects of Chemical Substances (RTECS) compiled by NIOSH; and (3) the inclusion of the trade secret exemption. We consider the validity of those aspects of the rule under the hybrid review scheme of section 6(f), which refers us to substantial evidence in the rulemaking proceeding. We first interpreted section 6(f) in *Synthetic Organic Chemical Manufacturers Association v. Brennan*, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1975). We noted that section 6(e) of the OSH Act requires that whenever the Secretary promulgates a standard he must publish a statement of the reasons for that action in the Federal Register. *Id.* at 1159-60. We held that these published reasons are subject to judicial review, and that they must be consistent with the language and purpose of the OSH Act. We held, further, that judicial review of a standard involves at least five steps:

(1) determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the action taken;

(2) determining whether the Secretary's promulgation adequately sets forth reasons for his action;

(3) determining whether the statement of reasons reflects consideration of factors relevant under the statute;

(4) determining whether presently available alternatives were at least considered; and

(5) if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

Id. at 1160. This approach to judicial review under section 6(f) has since been consistently followed. *See, e.g., American Iron and Steel Institute v. Occupational Safety and Health Administration*, 577 F.2d 825, 830-31 (3d Cir.1978), *cert. granted*, 448 U.S. 909, 100 S.Ct. 3054, 65 L.Ed.2d 1139 (1980); *cert. dismissed*, 448 U.S. 917, 101 S.Ct. 38, 65 L.Ed.2d 1180 (1980); *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety and Health Review Commission*, 534 F.2d 541, 551 (3d Cir.1976); *AFL-CIO v. Brennan*, 530 F.2d 109, 114 (3d Cir.1975). Moreover we have held that "in a § 6(f) proceeding the Secretary has an affirmative burden to demonstrate the reasonableness of an adopted standard." *Atlantic & Gulf Stevedores*, 534 F.2d at 551.

In this case no petitioner or intervenor questions the adequacy of the Secretary's notice of proposed rulemaking. Our review, therefore, involves the other four *Synthetic Organic* factors.

B. Limitation of Coverage to the Manufacturing Sector

None of the petitioners still before us contend that the manufacturing sector should not be covered by a hazard communication standard. The Secretary's decision to provide coverage only for employees in the manufacturing sector is based on a finding that this sector, which includes 32% of total employment, accounts for more than 50% of the reported cases of illness due to chemical exposure. 48 Fed. Reg. 53285 (1983). From this datum the Secretary determined that employees in the manufacturing sector have the greatest risk of experiencing health effects due to chemical exposure. *Id.* Agricultural employees have a higher chemical source incidence rate than manufacturing employees. The Secretary discounted this datum, however, because 80% of the reported chemical source cases among agricultural workers involved skin illnesses from handling plants, which would not be regulated by the proposed Hazard Communication Standard. *Id.* Moreover the Secretary concluded that the Environmental Protection Administration has, under the Federal Insecticide, Fungicide and Rodenticide Act, exercised jurisdiction over regulation of field use of pesticides. Excluding agricultural employees, there is substantial evidence in the record that the manufacturing sector has the highest incidence rate of chemical exposures which the Agency has authority to regulate.

Several petitioners, while conceding that the finding about incidence rate of illnesses in the manufacturing sector is supported by substantial evidence, contend that the Secretary's exclusion of other sectors, such as service, construction, and agriculture, is unsupported by reasons that are consistent with the purposes of the statute. They urge that while the incidence rate of employees in the manufacturing sector is high overall, some employees in specific non-manufacturing categories, such as hospital workers, are exposed to a greater number of toxic sub-

stances than are typical workers in the manufacturing sector. Moreover some workers in specific non-covered industries have higher reported rates of chemical source illness and injury than do workers in many covered industries. The Standard Industrial Classification breakdown, they contend, is not relevant to the statute, since that classification is made for a myriad of statistical purposes, mainly economic, having little to do with exposure to hazards. The result of the standard is that spray painters in the manufacturing sector, for example, must be provided with MSDS's and with information and training on hazardous chemicals in the products they use, while spray painters in the construction industry using the same products are not so protected.

In explaining the limited coverage, the Secretary reasoned:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

45 Fed.Reg. 53286. Rejecting arguments of participants in the rulemaking proceeding that other workers, such as painters in the construction industry, are exposed to the same hazards as are workers in the manufacturing sector, the Secretary reasoned:

> As stated previously, OSHA acknowledges that exposures to hazardous chemicals are occurring in other industries as well. A limited coverage of them is included in the final standard since all containers leaving the workplace of chemical manufacturers, importers, or distributors will be labeled, regardless of their intended destination. This will alert downstream users to the presence of hazardous chem-

> icals, and the availability of material safety data sheets. The Agency contends that the focus of this standard should remain on the manufacturing sector since that is where the greatest number of chemical source injuries and illnesses are occurring. This focus will also serve to ensure that hazard information is being generated for chemicals produced or imported into this country, and this increased availability will benefit all industry sectors.

Id. The Secretary's reasoning does not address the petitioners' contention that reliance on the Standard Industrial Classification is inappropriate because it ignores the high level of exposure in specific job settings outside the manufacturing sector.

The Secretary maintains that section 6(g) of the Act affords him unreviewable discretion to determine what industries shall be covered by a standard. That section provides in relevant part:

> In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.

29 U.S.C. § 655(g) (1982). We reject the Secretary's contention that his priority-setting authority under section 6(g) vitiates judicial review of his determination that only the manufacturing industry need be covered by the Hazard Communication Standard. Section 6(g) must be read in conjunction with section 6(f), which provides for judicial review of standards. Indeed the language "due regard to the urgency of the need for mandatory safety standards for particular industries" suggests to us a statutory standard by which to measure

the exercise of the Secretary's priority-setting discretion.[2] In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C.Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981), the court reviewed under section 6(f) the Secretary's decision to exempt the construction industry from a standard limiting exposure to lead. Although the court did not explicitly address section 6(g), it implicitly rejected the contention that the Secretary's priority-setting authority is unreviewable. We do so explicitly.

Our difficulty with the Secretary's reliance on section 6(g) arises from the Secretary's failure to explain why coverage of workers outside the manufacturing sector would have seriously impeded the rule-making process. Section 6(g) clearly permits the Secretary to set priorities for the use of the agency's resources, and to promulgate standards sequentially. Once a standard has been promulgated, however, the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards. *See United Steelworkers*, 647 F.2d at 1309-10. The explanation for the Secretary's action quoted above is deficient in the latter respect. Thus the Secretary has failed to carry the burden of persuading us that section 6(g) justifies limitation of coverage to the manufacturing sector.

We are also unpersuaded by the Secretary's contention that the communication rule will "trickle down" to uncovered workers because containers will be labeled. Section 6(b)(5) requires that:

> The Secretary, in promulgating standards dealing with toxic materials or other harmful physical agents

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[2] The Secretary urges that *Public Citizen Health Research Group v. Marshall*, 485 F. Supp. 845 (D.D.C. 1980) supports his interpretation of section 6(g). If it does, we decline to follow it.

> . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

29 U.S.C. § 655(b)(5) (1982). There is record evidence that workers in sectors other than manufacturing are exposed to the hazards associated with use of toxic materials or other harmful physical agents. The Secretary has given no statement of reasons why it would be given the same MSDS's and training as must be given to workers in the manufacturing sector. Section 6(c)(7) provides that:

> Any standard . . . shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(c)(7) (1981): The Secretary has given reasons why the labeling, MSDS, and instructions requirements comply with section 6(c)(7) for employees in the manufacturing sector, but no explanation why the same information is not needed for workers in other sectors exposed to industrial hazards. Such a statement of reasons is required by section 6(f). *Synthetic Organic*, 503 F.2d at 1160.

We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. That standard may continue to operate in the manufacturing sector, but the Secretary's explanation for excluding other sectors does not withstand the scrutiny mandated by

section 6(f). Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible. 29 U.S.C. § 655(b)(5).

C. Failure to Incorporate RTECS Hazard List

While the Hazard Communication Standard includes several lists of substances which chemical manufacturers and importers must treat as hazardous, the Standard places primary responsibility for determining which products are hazardous on the chemical manufacturer or importer. 29 C.F.R. § 1910.1200(d)(1) (1984). Petitioner Public Citizen urges that the Secretary should have adopted the RTECS list compiled by NIOSH. The agency found that the hazard determination procedure provided the most protective coverage possible by establishing standards to guide manufacturers in determining whether a substance is hazardous. 48 Fed.Reg. 53299. It rejected use of the RTECS list, finding that it was overinclusive because it encompasses "potential" as well as "indentifiable" hazards, *id.* at 53298, and that it was underinclusive because no one list can remain suitably up-to-date, *id.* at 53296. These findings are supported by the Introduction to the RTECS list in which the editor explains that "[t]he absence of a substance from the Registry does not imply that the substance is non-toxic, and thus non-hazardous, any more than the presence of a substance in the Registry indicates that the substance is hazardous in common use." NIOSH, Registry of Toxic Effects of Chemical Substances (RTECS) Introduction xi (July 1984). Indeed the editor notes that the RTECS list includes substances that are common in everyday life and in nearly every household. *Id.* at x.

The Public Citizen contends that OSHA's determination that the RTECS list is inappropriate is belied by the Agency's use of that list in its Records Access rule, *see*

Louisiana Chemical Association v. Bingham, 657 F.2d 777, 783 & n. 10 (5th Cir. 1981). The Records Access rule, which merely requires that employers make available those records which are kept anyway, imposes a much lighter burden on employers than the Hazard Communication Standard. Because the purposes and requirements of the two rules are not identical, it was reasonable for the Secretary to conclude that the hazard determination procedure for each rule need not be identical. We conclude that the Secretary's rejection of the RTECS list as overinclusive is supported by substantial evidence and is consistent with the OSH Act's statutory purposes.

D. The Trade Secret Exemption

Several petitioners challenge the inclusion in the Hazard Communication Standard of a "trade secret" exception. 29 C.F.R. § 1910.1200(i) (1984). They contend that the agency has defined "trade secret" too broadly, and that the conditions under which workers may obtain information claimed to be a trade secret are unduly burdensome.

1. The Definition of Trade Secret

Trade secret protection may arise from two sources: state law or a federal statute. *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984); *Chevron Chemical Co. v. Costle*, 641 F.2d 104, 115 (3d Cir.), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981). The OSH Act does not create substantive trade secret protection. It deals with that subject in section 15, which provides:

> All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of Title 18 shall be considered confidential for the purpose of that section,

> except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

29 U.S.C. § 664 (1982). The cross-reference to the Trade Secrets Act, 18 U.S.C. § 1905 (1982) confirms that Congress intended section 15 to protect against agency disclosure or misuse of data submitted to it under an expectation that the agency would treat that data as a trade secret to the extent that applicable state law did so. *See Ruckelshaus v. Monsanto, supra,* —— U.S. at ——, 104 S.Ct. at 2876. Section 15 cannot be read as authorizing the creation of trade secret protection going beyond that afforded under state law. Moreover that section deals only with what the agency and its employees may disclose, not with what disclosures the agency may compel in the interest of safety in the workplace.

The Secretary contends that while section 15 deals with disclosures by the agency and its employees, it embodies a recognition by Congress of the significance in the economy of state law trade secret protection, and that it was quite appropriate, in drafting the Hazard Communication Standard, to balance that recognition against the competing congressional concern over safety in the workplace. *See* 48 Fed.Reg. 53312 (1983). Aside from section 15, however, the Secretary points to no provision in the OSH Act authorizing such balancing. Indeed trade secret protection is not even mentioned in section 6, which directs that "[t]he Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5). The quoted provision indicates that Congress struck a balance in favor of

safety in the workplace at the expense of competing interests. In a slightly different context, the Supreme Court held that in section 6(b)(5), "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 509, 101 S.Ct. 2478, 2490, 69 L.Ed.2d 185 (1981).

The Secretary originally proposed that while traditional trade secrets such as chemical formula and process information could be withheld, chemical identity information must be disclosed. 46 Fed.Reg. at 4426 (1981). When representatives of the chemical industry commented on the importance of trade secrets to the economic health of that industry, *see* 48 Fed.Reg. 53312-14 (1983), the Secretary adopted an entirely new approach. First, it defined a trade secret as:

> [A]ny confidential formula, pattern, process, devise, information or compilation of information (including chemical name or other unique chemical identifier) that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

29 C.F.R. § 1910.1200(c) (1984). The Secretary contends that this definition was adopted from section 757 of the Restatement of Torts, 48 Fed.Reg. 53314. In fact, however, inclusion of the parenthetical "(including chemical name or other unique chemical identifier)" not found in section 757, enlarges considerably the Restatement definition. The Secretary's comments indicate that the definition provides trade secret protection for chemical identity which is determinable by reverse engineering. *Id.* This type of information has not traditionally been afforded trade secret protection under state law. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476, 94

S.Ct. 1879, 1883, 40 L.Ed.2d 315 (1974). The Restatement provides that information that may be properly acquired or duplicated without great difficulty should not be considered a trade secret Restatement of Torts, § 757, comment b. The Secretary justified the enlargement of the Restatement definition, reasoning:

> Many products can be reverse engineered if sophisticated analytical techniques are applied, yet cannot be if less advanced technology is used. The determination of what is "practical" in terms of reverse engineering capability rests with this degree of analysis, rather than with a definitive finding of "ability" to be reverse engineered or not. Furthermore, the definition of a trade secret says that the competitor or potential competitor does not know *or* use the information. Thus, even though a competitor could theoretically "reverse engineer" and discover the components of a product, if this information is not in fact used, it remains a *bona fide* trade secret.

48 Fed.Reg. 53314 (emphasis in original). Plainly the Secretary has provided greater protection for chemical manufacturers and importers than that afforded in those states utilizing the Restatement of Torts trade secret definition. Even the Restatement definition, however, goes beyond the protection afforded to trade secrets in other regulatory contexts. *See Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1287 (D.C.Cir. 1983) (Food and Drug Administration's adoption of Restatement of Torts trade secret definition inconsistent with Freedom of Information Act).

Section 15 deals only with disclosure by the agency or its employees, and section 6(b)(5) does not permit the Secretary to balance employee safety against competing economic concerns. No other statutory provision has been called to our attention which would justify enlarging

trade secret protection beyond that afforded by state law. Indeed it seems plain that state law cannot prevent the implementation of section 6 safety standards that are otherwise feasible. It appears that the unarticulated premise of the Secretary's concern about protecting trade secrets is that they may be constitutionally protected from the regulatory process. In *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (3d Cir. 1977), we rejected a constitutional challenge to rules requiring disclosure of proprietary information as a condition to licensing. The *Westinghouse* holding is supported by the Supreme Court's holding in *Ruckelshaus v. Monsanto Co.*, —— U.S. ——, ——, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984), that a trade secret voluntarily disclosed to the E.P.A. in exchange for a registration to sell pesticides is not protected if the owner had notice at the time of disclosure that the E.P.A. was authorized to use all data submitted. These cases suggest that a regulation requiring the disclosure even of formula or process information as a precondition for the sale of hazardous products for use in the workplace would be valid. *See* McGarity and Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 Harv.L.Rev. 837, 864-67 (1980). None of the petitioners urge that the Secretary should have required disclosure to that extent. They do contend, however, that the OSH Act does not authorize the Secretary to promulgate a regulation granting more protection to information claimed to be confidential than is afforded by state law.

We agree that there is no legal justification for affording broader trade secret protection in the Hazard Communication Standard than state law affords. No petitioner urges that the Secretary's original proposal, which would have protected formula and process information but required disclosure of hazardous ingredients, is inadequate. That proposal was consistent with "[t]he gen-

eral policy of OSHA . . . that the interests of employee safety and health are best served by full disclosure of chemical identity information." 48 Fed.Reg. 53312 (1983). The petition for review will therefore be granted and the proceedings remanded to the Secretary for reconsideration of the definition of trade secrets, which definition shall not include chemical identity information that is readily discoverable through reverse engineering.

2. The Access Rule

In addition to objections to the definition of trade secrets, several petitioners challenge the provisions of the Hazard Communication Standard relating to access to the allegedly confidential information. The petitioners contend that once a manufacturer raises a claim of trade secret, the Standard places overly stringent procedural barriers to the discovery of information relevant to the assessment of health hazards. These objections go to: a) the requirement that the request be in writing with a statement of need; b) the limitation of access to "health professionals"; and c) the requirement that a confidentiality agreement with a liquidated damages clause be signed. 29 C.F.R. § 1910.1200(i).

a) The Written Request Requirement

The Secretary justifies the requirement that a request for trade secret information be in writing with supporting documentation as a means of facilitating dispute resolution:

> Then if the matter is to be referred to OSHA to settle any dispute between the requesting party and the employer protecting a trade secret, the Agency will be able to base a decision upon a review of these written materials. Should the matter not be resolved to the satisfaction of all parties, it may result in a citation and referral to the Occupational Safety

and Health Review Commission (OSHRC) for judicial review.

48 Fed.Reg. at 53315. The tendered justification is both reasonable and consistent with the purposes of the Act.

b) The Restriction of Access to Health Professionals

The restriction limiting access to trade secrets to health professionals is more troublesome. Commentators on the proposed standard were generally in agreement that trade secret chemical identity information must be disclosed at least to a treating physician. *Id.* at 53316. The Secretary concluded that other health professionals, particularly those engaged in the prevention of disease or injury, had a legitimate need for chemical identity information. *Id.* at 53318. It declined, however, to authorize direct employee access to specific chemical identities of hazardous substances for which a trade secret is claimed. *Id.* The Secretary advances three rationales to justify restricting employee access to secret chemical identity information.

One reason is that "by and large professional training would be required" for any purpose that would amount to a "need to know" confidential information. *Id.* The United Steelworkers of America, AFL-CIO-CLC, a petitioner, points to a number of instances in the record, however, where non-health-professional workers used chemical identity information to improve workplace safety. They urge that employees and local union safety officers, although not health professionals, have often received training in health and safety, and thus know how to use the basic literature on chemical hazards, and know how to obtain technical assistance. Steelworkers' brief at 40.

A second reason advanced by the Secretary for allowing access only to health professionals, and not directly to employees, is that "providing access to trade secret chemical identities only to health professionals on a confiden-

tial basis will protect these employees adequately." 48 Fed.Reg. at 53318. The Steelworkers point to record evidence, however, that is quite difficult for many workers to obtain the serivces of a health professional, at least prior to the need for treatment. Steelworkers' brief at 41-42. There is no substantial evidence in the record that significant numbers of unorganized workers will be able to obtain the services of a health professional prior to the time that treatment becomes necessary. Even for organized workers, the record evidence suggests that few local unions retain health professionals.

The Secretary's final justification for limiting access to health professionals involves the risk of disclosure.

> This is not to say that "downstream" employees are more likely to disclose trade secrets or violate confidentiality agreements than health professionals, but it is an unmistakable fact that the more people who have access to confidential information, the more difficult it is to preserve its secrecy or to locate the source of a leak if one occurs.

48 Fed.Reg. at 53318. The Secretary correctly notes that the chance of a leak increases as the number of people having access to information increases. The issue posed by the petitioners, however, is not the number of persons obtaining access, but the type of persons. There is no record evidence supporting the Secretary's apparent conclusion that employees who are not health professionals will be more likely to breach a confidentiality agreement than would the same number of health professionals. We conclude that the restriction in the Hazard Communication Standard of access to trade secret information to health professionals is not supported by substantial evidence in the record, and is inconsistent with the mandate of section 6(b)(5) that OSHA promulgate the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee

will suffer material impairment of health. . . ." 29 U.S.C. § 655(b)(5).

c) The Confidentiality Agreement Requirement

The standard requires that, except in a medical emergency, a manufacturer which receives a request for trade secret information may require that the requester sign a confidentiality agreement containing a liquidated damages clause. 29 C.F.R. § 1910.1200(i)(3)(v) (1984). The Standard minimizes the risk that employers will make excessive demands for liquidated damages clauses by providing that the agreement "[m]ay not include requirements for the posting of a penalty bond," but only "a reasonable pre-estimate of likely damages. . . ." 29 C.F.R. § 1910.1200(i)(4)(ii) and (iii) (1984). Some petitioners contend that the requirement of a confidentiality agreement will deter health professionals from lending assistance. In Part IV(D)(2)(b) above we hold that the restriction on access to health professionals is invalid. But in any event, confidentiality agreements are a well-accepted traditional means of allowing access to trade secret information while effectively protecting the owners of that information from irreparable harm. Thus we reject petitioners' challenge to the Standard's requirement that requesters of trade secret information sign a confidentiality agreement.

V.

Conclusion

The petitions for review are properly filed in this court. The Hazard Communication Standard, to the extent that it is valid, preempts state hazard communication rules as they apply to employees in the manufacturing sector. The Standard may operate in that sector, but the Secretary will be directed to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such appli-

cation would not be feasible. The Secretary's ejection of the RTECS list as overinclusive is supported by substantial evidence, consistent with the OSH Act's statutory purpose and is therefore valid. The definition of trade secrets, which is broader than the protection afforded trade secrets by state law, is invalid, and the Secretary will be directed to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering. The trade secret access rule in the Standard is invalid insofar as it limits access to health professionals, but is otherwise valid, and the Secretary will be directed to adopt a rule permitting access by employees and their collective bargaining representatives.

JAMES McGIRR KELLY, District Judge, concurring and dissenting:

Although I concur with the majority's disposition of most of the issues in this case, I am unable to agree with the majority's position that restricting access to trade secret information to only health care professionals is inconsistent with the requirements of Section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), and is not supported by substantial evidence in the record.

Section 6(b)(5) states in pertinent part:

> (5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which *most adequately assures, to the extent feasible, on the basis of the best available evidence*, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. . . .

29 U.S.C. § 655(b)(5) (emphasis added).

There is no meaningful reason why every employee or his or her agent should be granted the right to obtain trade secret information. The majority, in overruling the Secretary's restriction which requires that trade secret information only be given to health care professionals, opens the door allowing every person in the work place the right to obtain trade secret information if the person signs a confidentiality statement. The majority holds that restricting trade secret information to the health care profession does not meet the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health. . . ." 29 U.S.C. § 655 (b)(5). I am not in accord with the majority's position which rejected the Secretary's viewpoint, which is that the health care professions can most adequately and professionally advise workers who may be exposed to hazardous chemicals. I see little, if any, benefit to allow any worker or his agent to obtain such confidential information. Moreover, I find that Section 15 of OSH Act, 29 U.S.C. § 664 is a guidepost to caution the Secretary not only when he or she seeks confidential information for any proceeding under the OSH Act, but also when he or she enacts standards to effectuate the intentions of Congress.

Indeed, Congress has made the Secretary a quasifiduciary for owners of trade secrets in that the Secretary, in exercising his or her powers, must be mindful of the interests the possessors of trade secrets have.

Accordingly, I respectfully dissent on this issue. In all other respects I concur with the majority opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New York, the State of New Jersey, the State of Connecticut, and National Paint & Coatings Association, *Intervenors.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, American Petroleum Institute & Atlantic Richfield Company, and National Paint & Coatings Association, *Intervenors.*

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent,

and

The State of New Jersey, Chemical Manufacturers Association, National Paint & Coatings Association, American Petroleum Institute & Atlantic Richfield Company,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Secretary of Labor, United States Department of Labor,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR and John Donovan, Secretary of the United States Department of Labor,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

JOHN A. PENDERGRASS, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor,
Respondent.

Argued March 23, 1987

Decided May 29, 1987

Before GIBBONS, Chief Judge, and FISHER, Chief Judge* and KELLY, District Judge**.

OPINION OF THE COURT

GIBBONS, Chief Judge.

United Steelworkers of America and Public Citizen, Inc., *et al.*, petitioners in the petition for review which this court granted in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985), now move to enforce that judgment. The respondent to the present motion, John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor, has been substituted for Thorne G. Auchter, his predecessor, as a party in this action. Petitioners contend that the Secretary has not complied with our judgment. In *United Steelworkers*, we held that the Hazard Communication Standard, promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L.No. 9-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)), is valid and may be applied in the manufacturing sector, but we directed the Secretary "to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 743. The Secretary contends that he has fully complied with that judgment, which was formally issued on July 8, 1985. He maintains this contention despite the fact that no

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* Hon. Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

final position with respect to the application of the hazard communication standard outside the manufacturing sector has been taken, and the fact that there is not intention to take such a position until "early 1988." We conclude that the Secretary has not acted in compliance with this court's judgment and has withheld or unreasonably delayed agency action, and that further relief is necessary.

I.

In 1970, Congress enacted the OSH Act and directed the Secretary of Labor to promulgate occupational safety and health standards to further the purpose of the OSH Act—that is, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. §§ 651(b), 655(b)(1). Section 6(b)(7) of the OSH Act explicitly requires that

> [a]ny standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

29 U.S.C. § 655(b)(7). Section 7(b) of the OSH Act, as amended, provides that "[a]ny advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 655 of this title." 29 U.S.C. § 656(b). A Standards Advisory Committee on Hazardous Materials Labeling (Advisory Committee) was established in 1974 and was charged with

> develop[ing] guidelines for categorizing and ranking hazards of materials, and guidelines for prescribing the required warnings of such hazards and related information and symptomatology, protective steps and equipment, and safe handling procedures, by such

means as labels, data sheets, and training requirements.

Report of the Standards Advisory Committee on Hazardous Materials Labeling dated June 6, 1975 at iv. The Advisory Committee was directed to submit within 270 days a report to the Secretary in a form from which regulations could be fashioned. *Id.* at iv, 26. The Advisory Committee submitted its report on June 6, 1975, recommending what it described as a "total system" approach to hazard communication, which included the preparation of Material Safety Data Sheets (MSDSs), labeling, and employee training programs. *See id.* at 4-5. The report, like the OSH Act, referred to all workers, making no distinction among employees in different sectors of the economy. Although the Advisory Committee Report was received by the Secretary in June, 1975, no notice of proposed rulemaking on hazard communication was published for some time. On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous materials labeling." *Id.* at 5,373. Among the topics on which comments were requested was "[s]upported cost data of the estimated costs of coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendations, was addressed to all employers, not only to employers in the manufacturing sector.

On January 16, 1981, more than ten years after the enactment of section 6(b)(7) of the OSH Act, more than

five years after the Secretary received the Advisory Commitee Report, and almost four years after the June 28, 1977 advance notice of proposed rulemaking, the Secretary issued a notice of proposed rulemaking on hazard identification. *See* 46 Fed.Reg. 4,412 (1981). This notice specified that comments had to be received on or before April 18, 1981, and that hearings would be held at five places between May 26, 1981 and September 1, 1981. The proposed hazard communication standard was to be applicable to employers in Division D (manufacturing), major groups 20-39 in the most recent revision of the Standard Industrial Classification Manual published by the Office of Management and Budget (the manufacturing sector). *Id.* at 4,426. The notice further provided:

> Although evidence is presently lacking, the need for the protections of the hazards identification standard may well be as great in some industries excluded from coverage as they are in those covered. Accordingly, OSHA invites comment on the appropriate scope of coverage. Employers currently excluded from the scope of the proposal may be included in the scope of the final standard if evidence in the record ultimately warrants such inclusion. They and others interested in this issue are therefore given notice that they should be prepared to participate in the rulemaking and provide justification, if they so desire, of why particular classes of employers should or should not be excluded.

Id. Thus, the 1981 notice of rulemaking gave notice that employers outside the manufacturing sector should comment and provide information at the scheduled hearings as to why their employees should or should not be excluded.

The 1981 notice of proposed rulemaking was withdrawn, however, on February 12, 1981 for further consideration of regulatory alternatives. *See* 46 Fed.Reg.

12,214 (1981). The notice of withdrawal did not suggest any change in the scope of coverage of any new proposal. Over a year later, a new notice of a proposed hazard communication rule and of public hearing on the proposal was published. *See* 47 Fed.Reg. 12,092 (1982). Like its February 12, 1981 predecessor, the 1982 notice referred to the 1975 Advisory Committee Report. *See id.* Like the 1981 proposed standard, the 1982 proposed standard was also to be applicable to employers in the manufacturing sector. The notice provided, however:

> Although non-manufacturing employers are not covered by the proposal, it is expected that their employees will also benefit from it to a great extent since employees in the manufacturing sectors will be required to send the hazard-related information downstream to their customers. Once finalized and implemented, its effectiveness in triggering downstream transmittal could be assessed, and determinations made as to the type of hazard communication standard that may be effective and beneficial for other industries, such as construction or agriculture. If necessary, the proposal could be extended or modified for these other industries at a later date.
>
> Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.

Id. at 12,101-02. Thus, as in the 1981 notice of rulemaking, employers outside the manufacturing sector were given notice that the hazard communication standard might be applied to them, and were invited to comment.

On November 25, 1983, almost thirteen years after section 6(b)(7) was enacted, and over seven years after the Secretary received the Advisory Committee Report, a final hazard communication standard was published. *See* 48 Fed.Reg. 53,280 (1983) (codified at 29 C.F.R.

§ 1910.1200 (1986)). Consistent with the Advisory Committee recommendation, it places primary responsibility for the identification of hazardous substances on their manufacturers and importers, requiring them to prepare MSDSs and to place hazard communication information on labels. *See United Steelworkers v. Auchter*, 763 F.2d at 732-33. It also requires that covered employers make the MSDSs available for employee inspection, 29 C.F.R. § 1910.1200(g)(8) (1986), and "provide employees with information and training on hazardous chemicals in their work area . . .," 29 C.F.R. § 1910.1200 (h)(1986). The final rule protects only employees in the manufacturing sector. Since all chemical manufacturers are in that sector, however, the only sigificance of limiting the rule to the manufacturing sector is with respect to the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training. All employees outside the manufacturing sector are downstream from those upon whom the labeling and identification obligations are imposed. As the standard currently reads, it does not require producers or intermediate suppliers of hazardous substances to provide either MSDSs or properly labeled containers to users in industries outside the manufacturing sector. Both producers and intermediate suppliers must, however, transmit MSDSs and labeled containers to manufacturing sector employers. In addressing the burden of this requirement on intermediate suppliers, OSHA noted that "[t]he additional costs . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331.

In justifying the narrow scope of the final rule, the Secretary explained:

> Although hazardous chemicals are used in other industries as well, OSHA determined that the employees in the manufacturing sector are at the greatest

> risk of experiencing health effects from exposure to hazardous chemicals. The Agency thus decided to exercise its authority to set priorities for standards for promulgation under Section 6(g) of the Act, and limited the proposed standard's scope of the manufacturing sector.

48 Fed.Reg. 53,284 (1983). The Secretary explained, further:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need.

Id. at 53,286.

II.

In the prior case, the petitioners here, among others, petitioned this court for review of the final standard. They challenged the limited scope of the hazard communication standard, contending that it should not have been limited to the manufacturing sector. Petitioners argued that the exclusion of non-manufacturing industries, many of which have a high incidence of chemical injuries and illnesses, was not supported by the rulemaking record and contravened the purposes of the OSH Act. *See* 763 F.2d at 737.

On the other hand, the Secretary defended the limited scope of the standard solely on the ground that, under 29 U.S.C. § 655(g), he had unreviewable discretion to establish rulemaking practices and chose to address the sector with the most serious problems first. In *United Steelworkers*, we expressly rejected the Secretary's position, holding that he had no discretion to "exclude a particular industry [unless] he informs the reviewing

court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. That holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees. Our prior decision is unequivocal:

> We hold, therefore, that the petitions for review of those petitioners who object to the limitation of the Hazard Communication Standard must be granted. . . . Thus the Secretary will be directed to reconsider the application of the standard to employees in other sectors *and to order its application to other sectors unless he can state reasons why such application would not be feasible.* 29 U.S.C. § 655(b)(5).

763 F.2d at 739 (emphasis added). Moreover, our July 8, 1985 judgment is equally unequivocal. The Secretary was directed "to reconsider its application in other sectors *and to order its application in those sectors unless he can state reasons why such application would not be feasible.*" *United Steelworkers v. Auchter*, Nos. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093, 84-3128 (3d Cir. July 8, 1985) (Judgment) (emphasis added). It cannot be seriously contended that that direction permitted the Secretary to do anything other than consider, on the basis of the rulemaking record which we had before us in 1985, the issue of feasibility of communication of hazard information to employees in the non-manufacturing sectors.

III.

Despite the language of our opinion and for our judgment, on November 27, 1985 the Secretary issued an advanced notice of proposed rulemaking, claiming that

the record was insufficient on the issue of the feasibility of expanding the applicability of the standard. The 1985 notice solicited comment on present hazard communication practices in sectors other than manufacturing and on the likely economic impact of extending the hazard communication standard to fifty non-manufacturing industry groups.[1] *See* 50 Fed.Reg. 48,794 (1985). The notice fixed a ninety-day period for comments. It posed nine groups of questions seeking information about the industries not covered by the rule,[2] and three groups of

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[1] In contrast with his position with respect to hazard communication in non-manufacturing sectors, the Secretary apparently had no difficulty in complying with that part of our judgment directing him "to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering" and "to adopt a rule permitting access [to trade secret information] by employees and their collective bargaining representatives." 763 F.2d at 743. The Secretary, without further rulemaking, promptly issued an interim final rule complying with these directions. *See* 50 Fed. Reg. 48,750 (1985).

[2] The questions asked about uncovered industries are:

1. Please indicate the industry or industries to which the information supplied applies (by SIC Code if possible).

2. What is the current industry practice regarding hazard communications? Do employers generally have written hazard communication programs? Are containers labeled? Are material safety data sheets available for the hazardous chemicals? Are employees trained regarding the hazards and appropriate precautionary measures?

3. What are the costs associated with the aspects of hazard communication that are currently implemented in the industry? Please indicate by specific activity if possible, i.e., costs for training, labels, etc. Based on the present provisions of the Hazard Communication Standard, what additional costs are estimated to be incurred if the standard were extended to your industry?

4. If OSHA extended the provisions of the Hazard Communication Standard to this industry as written, what problems might arise in obtaining or transmitting hazard information? (For example, are there special problems associated with the agricultural industry or small businesses?) What solutions to

questions about possible modifications of the standard as written. We conclude that this further inquiry was unnecessary.

Some of the questions could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident. For example, the Secretary asked "Are containers labeled? Are material safety data sheets available for the hazardous chemicals?" The standard already in place when these questions were posed required that the chemical manufacturer or importer label containers and prepare ma-

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these problems can you suggest that would still result in employees getting the information they need?

5. Does this industry have fixed work sites? If not, is there some central point where information could be made accessible?

6. Does this industry have transient workers? What current practices are used to ensure such workers are apprised of the hazards they may encounter on the site? Is there training or information specific to the types of jobs performed?

7. To what extent are hazardous chemicals purchased from retail distributors? How is information obtained about these chemicals when purchased from these types of establishments? Do the retail distributors provide hazard information? Are manufacturers contacted directly for the information? If so, has this been a successful approach? Are employees exposed to the chemical involved without receiving information about the specific hazards? How is a determination made regarding the appropriate protective measures to be implemented in this situation?

8. Are "consumer products" used in this industry in a manner that results in different exposure levels than would be encountered in consumer usage? What types of products are these? How is hazard information obtained for these products?

9. Is this industry subject to state-initiated "right-to-know" laws? What has been the industry's experience under such state laws? Are there particular provisions that have been difficult to implement in this industry? If so, what alternative provisions are suggested to ensure employees received the necessary information? To what extent is the industry complying with the state laws?

50 Fed. Reg. at 48,795.

terial safety data sheets. The Secretary also asked, "Does [the] industry have fixed work sites?", knowing full well that the construction industry does not. The Secretary asked "Does [the] industry have transient workers?", knowing full well that the agricultural industry does.

Moreover, most of the remaining detailed questions could have been equally applicable to manufacturing sector employers. Yet the Secretary had not found it necessary to ask them of those employers in the June 28, 1977 advance notice of proposed rulemaking, 42 Fed.Reg. 5,372, in the January 16, 1981 notice of proposed rulemaking, 46 Fed.Reg. 4,412, or in the March 19, 1982 notice of proposed rulemaking, 47 Fed.Reg. 12,092. Nevertheless, the Secretary was able to determine that the hazard communication standard could feasibly be applied in the manufacturing sector. In addition, as noted in Part I above, the 1977 and 1981 notices requested comment from employers in the non-manufacturing sectors and gave notice that the rule might be extended to them. Finally, even today the Secretary, responding to petitioners' motion, does not point to any information received as a result of the November 27, 1975 notice of rulemaking which was not either known or readily ascertainable prior to our last decision. Although the comment period specified in the November 27, 1985 notice expired on February 25, 1986, we have been given no plausible explanation for the delay in formulating a rule between then and now, or for further proposed delay until early 1988.

We hold the Secretary is not in compliance with our previous judgment. As he well understood with respect to the trade secrets issues, that judgment did not contemplate going back to square one. It contemplated action by the Agency on the record which we reviewed. That record was developed after notice to all interested parties that they should furnish "cost data of the estimated costs of coming into compliance with the recom-

mendations of the advisory committee." 42 Fed.Reg. at 5,373. The hazard communication standard adopts essentially the same scheme as the Advisory Committee proposed. The 1977 notice was not limited to the manufacturing sector. Although subsequent notices proposed such limited application, they put interested parties on notice that the application might be broader and invited comment in light of that possibility. The final standard included importers and distributors who had previously been excluded from coverage. *See* 48 Fed.Reg. at 53,331.

An agency may adopt a scope which is "different—even substantially different—from the proposed rule" without engaging in a whole new round of notice and comment. *See American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) (*citing International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C.Cir.1973)). *See also United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir.), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed.Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption.

The Secretary, relying on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), contends that he should be free to discharge the task of implementing section 6 of the OSH Act at a pace selected in his discretion. *Vermont Yankee* is not relevant, however, for the case is before us at an entirely different stage. Our prior decision considered rulemaking after full rulemaking procedures had taken place. Moreover, we are not dealing with the mod-

ification of a standard based on considerations arising after promulgation of an initial standard. Thus, the Secretary's *Vermont Yankee* argument is no more than an effort to relitigate the contention, explicitly rejected in *United Steelworkers of America v. Auchter*, 763 F.2d at 738, that his priority-setting authority permits him, without explanation, to exclude categories of workers from a duly promulgated standard.

IV.

Sixteen years after Congress directed the Secretary to "prescribe the use of labels or other appropriate forms of warnings as are necessary to insure that employees are apprised of all hazards to which they are exposed", 29 U.S.C. § 655(b)(7), no standard has been promulgated covering approximately two thirds of all workers covered by the OSH Act. This court is empowered by the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1982). Moreover, we may issue "all writs necessary or appropriate in aid of" our jurisdiction. 28 U.S.C. § 165(a) (1982). Thus, we can issue orders necessary or appropriate to the enforcement of our prior judgment. Exercising the powers conferred by both statutes, we will direct that the Secretary shall, within sixty days of the date of our order,[3] publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers. Because our prior judgment did not include a specific time limit we will deny, at this time, the petitioners' motion to hold the respondents in contempt.

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[3] Judge Kelly would grant 120 days for compliance.

APPENDIX F

SUBSIDIARIES AND AFFILIATES OF UNITED TECHNOLOGIES CORPORATION

Name	State or Country of Incorporation
AAC-Westland Limited	United Kingdom
Ancensores Angulo S.A.	Spain
Ansensores y Montacargas Eguren S.A.	Peru
Armorlift S.A.R.L.	France
Ascendes S.A.	Luxembourg
Ascenseurs Clerebout S.A.	Belgium
Ascenseurs Gendre Otis S.A.	Switzerland
Ascenseurs J. Camus	France
Ascenseurs Menard S.A.	France
Ascenseurs W. Sangalli S.A.	France
Ascinter-Otis S.A.	France
Bec Air S.A.	France
Carican Enterprises Company Limited	Taiwan
Carlo Eisner S.p.A.	Italy
Carrier Air Conditioning (Holdings) Limited	New South Wales
Carrier Air Conditioning (New Guinea) Pty. Limited	New Guinea
Carrier Aircon Limited	India
Carrier Experts Service (Central Maylasia) Sdn. Bhd.	Malaysia
Carrier Higashi-Chugoku Co., Ltd.	Japan
Carrier International Sdn. Berhad	Malaysia
Carrier Nishi Chugoku Co. Ltd.	Japan
Carrier Saudi Service Company	Saudi Arabia
Carrier Services Management Pty. Limited	New South Wales
Carrier Taiwan Co., Ltd.	Taiwan
Carrier-U.K. Distribution Limited	United Kingdom

Carter Wind Systems, Inc.	Texas
CEAM Lazio Sud	Italy
CEAM Servizi Adriatica	Italy
CEAM Servizi Firenze	Italy
CEAM Servizi Marenna	Italy
CEAM Servizi Milano	Italy
CEAM Servizi Tirrenica	Italy
CEAM Servizi Torino	Italy
China Tianjin Otis Elevator Company, Ltd.	China
Clymalynx A.G.	Liechtenstein
Companhia Eletromecanica	Brazil
COMPORTEL, S.A.R.L.	Portugal
Composite Materials Characterization, Inc.	Delaware
Daewoo Carrier Corporation	Korea
Daewoo-Sikorsky Aerospace, Ltd.	Korea
Diavia S.p.A.	Italy
Dynamic Turbocharger Services Pty. Limited Ltd. (Queensland)	Australia
Dynamic Turbocharger Services Pty. Limited Ltd. (Victoria)	Australia
E.H. Industries Limited	United Kingdom
Eddy Current Testing (Pte.) Ltd.	Singapore
ELEMA S.A.	Spain
Elevadores Canarios S.A.	Spain
Elevadores en Servicio, S.A. de C.V.	Mexico
Entalpia E.A. de C.V.	Mexico
Entrol Systems Sdn. Berhad	Malaysia
Essener Aufzugsfabrik Bruno-Haack G.m.b.H.	West Germany
Essex Electricas Industriales, S.A. de C.V.	Mexico
European Aerospace Company, N.V.	Belgium
FES, Inc.	Pennsylvania
Flohr-Otis Aufzuege G.m.b.H.	West Germany
Freissler Otis G.m.b.H.	Austria
Frimar S.r.L.	Italy
Gate France S.A.	France

Gate S.p.A.	Italy
GEAT Gesellschaft fur Angewandte Technologie G.m.b.H.	West Germany
General Aircon Distribution, Ltd.	Japan
Gestem S.A.	Belgium
Grimm-Carrier Ltd.	Thailand
Guide Rails Pty. Ltd.	Australia
Hamilton Standard Stork B.V.	Netherlands
Hebo Fordertechnik G.m.b.H.	West Germany
Heli-Europe Industries Limited	United Kingdom
IAE International Aero Engines A.G.	Switzerland
Industrial Electrical Specialities, Inc.	Illinois
Internacional de Climatizacione S.A.	Spain
International Fuel Cells Corporation	Maryland
Isola Essex AG	Switzerland
Isolants Nord Afrique S.A.	Algeria
Keihin Sobi Kabushiki-Kaisha	Japan
Lakshamanan Isola Ltd.	India
Link-Carlyle Ltd.	Thailand
Manufacturas Especializadas, S.A.	Mexico
Mecanismos Auxiliares Industriales, S.A.	Spain
Microtecnica S.p.A.	Italy
Monitor SNC	France
Mostek France S.A.R.L.	France
MT Holdings	Italy
National Trading Corporation S.A.L.	Lebanon
Nippon Otis Elevator Company	Japan
Normalair-Garrett (Holdings) Limited	United Kingdom
Norsk Jetmotor	Norway
Otis Elevator Company	Kuwait
Otis Elevator Company (India) Limited	India
Otis Elevator Company Limited	South Africa
Otis Elevator Company S.A.E.	Egypt
Otis Elevator Company S.A.L.	Lebanon
Otis Elevator Saudi Arabia Ltd.	Saudi Arabia
Otis Europe S.A.	France

Otis Maroc S.A.	Morocco
P&WC Aircraft Services (A'Asia) Pty. Ltd.	Australasia
Parker Electronics, Inc.	Delaware
Pernas Otis Elevator Company Sdn. Bhd.	Malaysia
Phoenix Travel (Yeovil) Limited	United Kingdom
Prato Ascensori	Italy
Pratt & Whitney Canada Inc.	Canada
Pratt & Whitney Overhaul & Repair Center—Europe B.V.	Netherlands
Precilec S.A.	France
Q-Carrier (B) Sedirian Berhad	Brunei
Ratier-Figeac	France
Ratier-Forest G.S.P.	France
Samsung-United Aerospace Co. Ltd.	Korea
SARI Otis (Gestion), S.A.	France
SARI Otis (Maintenance), S.A.	France
SGC Holding Co., Inc.	Delaware
Shanghai Tong Hui Carrier A/C Equipment Co. Ltd.	Taiwan
Shenzhen Carrier Service Company	Taiwan
Sito Realty Company, Inc.	Philippines
Societe de Connecteurs de Decazeville, S.A.R.L.	France
Societe Nationale d'Etude et de Construction de Moteurs d'Aviation	France
Societe Offranvillaise de Technologie, S.A.	France
Societe Rhodanienne Ascenseurs e Monte-Charge	France
SODICA S.A.	France
Springer Carrier do Nordeste S.A.	Brazil
Springer Carrier S.A.	Brazil
Steelweld S.A.R.L.	France
Stephen Howe Limited	United Kingdom
Stigler Otis, S.p.A.	Italy
Tampereen Talohissi Oy	Finland

Tatung Otis Elevator Company	Taiwan
Telefunken electronic G.m.b.H.	West Germany
The Belton Corporation	Delaware
Trevino Transporte S.A. de C.V.	Mexico
Turbine Overhaul Services Pte. Ltd.	Singapore
Turborreactores, S.A. de C.V.	Mexico
United Technologies Furukawa Corporation	Delaware
United Technologies Gate Espana S.A.	Spain
United Technologies International Operations (Nigeria) Ltd.	Nigeria
United Technologies Saudi Arabia, Ltd.	Saudi Arabia
UT Insurance Company, Ltd.	Bermuda
UTG-United Technologies Grundig G.m.b.H.	West Germany
Val-Lift S.A.	Switzerland
Valmet Otis Oy	Finland
Vegotrans B.V.	Netherlands
Westland Finance Inc.	United States
Westland plc.	United Kingdom
Zardoya Otis, S.A.	Spain

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions

Article I, Section 1 of the United States Constitution provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Statutes

Section 3(8) of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. § 652(8), provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2), provides:

> The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submissions.

Section 6(b)(3) of the Act, 29 U.S.C. § 655(b)(3), provides:

> On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), provides:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(f) of the Act, 29 U.S.C. § 655(f), provides:

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

Regulations

Occupational Safety and Health Administration, Hazard Communication; Final Rule, 52 Fed. Reg. 31,852, 31,879-80, codified at 29 C.F.R. § 1910.1200(d)(3), provides:*

> (3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:
>
> (i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,
>
> (ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).
>
> The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

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* A copy of the Final Rule has been filed with the Clerk of this Court.

Supreme Court, U.S.
FILED
APR 3
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1070, 88-1075 and 88-1385

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor provided adequate notice to non-manufacturers that the hazard communication standard might be extended to them.

2. Whether the Secretary properly extended the hazard communication standard, which initially applied only to the manufacturing sector, to non-manufacturing sectors based on a general finding that the standard is reasonably necessary and appropriate to remedy a significant risk of material harm in those sectors, rather than on industry-specific findings.

3. Whether the Secretary properly determined that extension of the hazard communication standard to the non-manufacturing sectors was technologically and economically feasible.

4. Whether the Secretary's incorporation into the hazard communication standard of a list of hazardous chemicals developed by a private professional and scientific organization (the American Conference of Governmental Industrial Hygienists) constituted an unlawful delegation of rulemaking authority.

5. Whether the court of appeals erred in invalidating the Office of Management and Budget's disapproval, pursuant to the Paperwork Reduction Act of 1980, of certain provisions of the hazard communication standard.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1385

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated*

Builders) is reported at 862 F.2d 63 (88-1070 Pet. App. 1a-15a; 88-1075 Pet. App. 1a-15a; 88-1385 Pet. App. 1a-15a). The opinion of the court of appeals in *United Steelworkers of America* v. *Pendergrass* (*USWA III*) is reported at 855 F.2d 108 (88-1070 Pet. App. 54a-68a; 88-1075 Pet. App. 24a-37a).

JURISDICTION

The court of appeals entered its judgment in *Associated Builders* on November 25, 1988 (88-1070 Pet. App. 19a-21a; 88-1075 Pet. App. 20a-23a; 88-1385 Pet. App. 19a-21a). The court of appeals entered its judgment in *USWA III* on August 19, 1988, and it denied the government's petition for rehearing on November 28, 1988 (88-1075 Pet. App. 38a-39a). Associated General Contractors, Associated Builders and Contractors, and the National Grain and Feed Association (together with United Technologies Corporation) filed petitions for a writ of certiorari on December 23, 1988, December 28, 1988, and February 21, 1989, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. In 1983, the Secretary of Labor published a final occupational hazard communication standard designed to address comprehensively "the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector" (29 C.F.R. 1910.1200(a)(2) (1984)). See 48 Fed. Reg. 53,280 (1983). The Secretary explained that she was limiting the standard's coverage to the manufacturing sector based on her determination "to first regulate those industries with the greatest demonstrated need" (*id.* at 53,286). On judicial review, the court of appeals held that the limitation to the manufacturing sector was unsupported and directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

United Steelworkers of America v. *Auchter* (*USWA I*), 763 F.2d 728, 736-738, 739 (3d Cir. 1985).

The Secretary thereupon commenced a new rulemaking proceeding and solicited comments on the extension of the hazard communication standard to the non-manufacturing sector. See 50 Fed. Reg. 48,794 (1985). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987). Although the federal government disagreed with that ruling, the Solicitor General determined, after rehearing was denied, not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the

non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987).[1] The Office of Management and Budget (OMB) reviewed the standard pursuant to its authority under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* It disapproved three particular provisions and instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (52 Fed. Reg. 46,075, 46,076, 46,079 (1987)).[2]

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[1] Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). The standard defines the chemical hazards that are covered and sets forth criteria the chemical manufacturers and importers must follow in making hazard determinations; it also incorporates several recognized lists of hazardous chemicals, inclusion on which automatically requires treatment of the chemical as hazardous for purposes of hazard communication (29 C.F.R. 1910.1200(c), (d), and Apps. A-C). Furthermore, the standard requires manufacturing and non-manufacturing employers (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers, and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200(e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

[2] Specifically, OMB disapproved (1) "the requirement that [MSDSs] be provided on multi-employer worksites" through either the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" that is in the same form and concentration as a consumer product, regardless of

2. The revised standard gave rise to two distinct legal challenges. In the first challenge, organizations representing employee interests in *USWA I* and *USWA II* argued that the Secretary was in contempt of the earlier orders when she acceded to OMB's review and disapproval of portions of the standard. More fundamentally, they argued that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while disagreeing that the Secretary was in contempt, agreed with the attack on OMB's authority and invalidated its disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), 855 F.2d 108 (3d Cir. 1988); 88-1075 Pet. App. 24a-37a.

In the second challenge, brought pursuant to 29 U.S.C. 655(f), organizations representing certain non-manufacturing employers argued that the Secretary improperly extended the hazard communication standard to the non-manufacturing sectors. The court of appeals disagreed with that contention and affirmed the validity of the standard. *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated Builders*), 862 F.2d 63 (3d Cir. 1988); 88-1075 Pet. App. 1a-15a. The court concluded that its previous decisions in *USWA I* and *USWA II* largely controlled the outcome of the employer challenge (*id.* at 7a). The court rejected, both as a matter of precedent and on the merits, the employers' argument that the Secretary had failed to provide adequate notice to the non-manufacturing sectors that the agency's final standard

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how the product is used; and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), (e)(2)(i).

might apply to them (*id.* at 10a-11a). It also reiterated its prior holding in *USWA I* that the Secretary had adequately made a general significant risk finding applicable to all workers exposed to hazardous chemicals, and held that the Secretary was not required to make specific findings of significant risk for each affected industry and substance (*id.* at 11a-13a). The court further concluded that the Secretary's feasibility determination was supported by substantial evidence, observing that the main components of the standard applicable to non-manufacturers—training and the maintenance of labels and data sheets—do not even approach the limits of feasibility (*id.* at 13a-14a).

In addition, the court ruled that the Secretary did not unlawfully delegate her rulemaking authority to a private organization (the American Conference of Governmental Industrial Hygienists (ACGIH)) when she incorporated that organization's list of hazardous chemicals into the standard (88-1075 Pet. App. 14a-15a). The court held that the validity of the Secretary's reliance on ACGIH—an "impartial scientific organization"—necessarily followed from its determination in *USWA I* that OSHA was not itself required to evaluate specific chemical hazards, but could impose that duty on the chemical manufacturers (*id.* at 15a). Moreover, the court concluded that adopting the ACGIH list as a floor of covered substances was fully consistent with the OSH Act, which directs OSHA to base its toxic substance standards on the "best available evidence" with due consideration to "the latest available scientific data" (*ibid.*). See 29 U.S.C. 655(b)(5).

ARGUMENT

1. Given the decisions in *USWA I* and *USWA II*, which are now final, the decision of the court of appeals in *Associated Builders* is correct. In any event, that decision

does not present any significant or recurring issues of law, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of that decision is not warranted.

a. Petitioners ABC and NGFA contend (88-1075 Pet. 11-14; 88-1385 Pet. 23-26) that they received inadequate notice because the Secretary issued the revised hazard communication standard without first issuing a proposed rule applicable to non-manufacturers. This contention overlooks the fact that, as the court of appeals exhaustively detailed in *USWA II* and reiterated in the opinion below (88-1075 Pet. App. 10a), "the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding." In 1977, the Secretary issued an Advance Notice of Proposed Rulemaking that was not limited to the manufacturing sector, but invited all "interested persons" to submit information concerning the need for a hazard communication standard. 42 Fed. Reg. 5372, 5373; *USWA II*, 819 F.2d at 1265. This was followed by the 1982 notice of proposed rulemaking which "was at least as explicit." 88-1075 Pet. App. 11a. While proposing to cover only the manufacturing sector, "[t]hat notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included." *Ibid.*; *USWA II*, 819 F.2d at 1266; 47 Fed. Reg. 12,092, 12,101-12,102.[3]

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[3] An earlier 1981 notice of proposed rulemaking, which was subsequently withdrawn for consideration of regulatory alternatives, similarly focused on the manufacturing sector while inviting comment "on the appropriate scope of coverage." 46 Fed. Reg. 4412, 4426; *USWA II*, 819 F.2d at 1265-1266.

Indeed, the court of appeals' remand in *USWA I* was based on that court's conclusion that the Secretary had already provided adequate notice to the non-manufacturing sectors. See *USWA II*, 819 F.2d at 1269. The court concluded that since "what was at issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees," no further evidentiary inquiry was necessary and that the original rulemaking record was adequate for purposes of the remand. *Id.* at 1267; see also *id.* at 1269 (the Secretary could "easily determine []" from the original record the non-manufacturing sectors' ability to comply with the standard); 48 Fed. Reg. 53,280, 53,286 (1983 final rule) (noting comments suggesting "that the scope [of the standard] should be expanded to cover all industries where employees are exposed to hazardous chemicals").

Petitioners' contention that the Secretary's failure to repromulgate a proposed rule for the non-manufacturing sectors violated Section 6(b)(2) of the OSH Act, 29 U.S.C. 655(b)(2), therefore lacks merit, because the earlier notices were legally "sufficient to alert all employers" to the scope issue and the ensuing revised final standard was a "logical outgrowth" of the proposals and the rulemaking that followed. 88-1075 Pet. App. 11a. See also *USWA III*, 88-1075 Pet. App. 36a; *USWA II*, 819 F.2d at 1269; *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The court of appeals correctly held, both as a matter of circuit precedent and on the merits, that the Secretary had provided adequate notice to all employers. See *United Steelworkers of America* v. *Marshall*, 647 F.2d

1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S 913 (1981).[4]

Petitioners additionally argue (88-1070 Pet. 24-25; 88-1075 Pet. 13 n.5; 88-1385 Pet. 24-25) that, regardless of whether OSHA had provided legal notice to all employers, the court erred in cutting off the Secretary's additional round of notice and comment. This argument is unavailing. In *USWA II*, the Secretary defended her post-remand decision to conduct further rulemaking proceedings as well within her administrative discretion. The Secretary believed it would be useful to develop the record on feasibility in the non-manufacturing sectors, which,

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[4] As the court elsewhere held, the holding that the Secretary provided adequate notice also pertains to the several modifications to substantive aspects of the standard that were made in the revised standard: "The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed." *USWA III*, 88-1075 Pet. App. 36a, quoted in *Associated Builders*, 88-1075 Pet. App. 9a. This is certainly true of the change in the definition of "chemical manufacturer," 29 C.F.R. 1910.1200(c), to which petitioner NGFA objects (88-1385 Pet. 25-26 n.18). In keeping with the general broadening of the scope of the standard, this term was redefined solely by eliminating the reference to SIC Codes 20-39 (the manufacturing sector). In almost all cases, the change is purely technical and does not affect the assignment of responsibility for the development of hazard information; it does, however, capture the relatively unusual circumstance (as in the case of grain elevators) where a "chemical" is "produced" (*i.e.*, "manufacture[d], processe[d], formulate[d] or repackage[d]" by an employer outside of SIC Codes 20-39. 29 C.F.R. 1910.1200(c). Moreover, contrary to NGFA's suggestion (88-1385 Pet. 26 n.18), there is nothing incongruous about including grain dust in a hazard communication standard applicable to chemicals; the fact that grain is a food obviously does not mean that its dust is harmless to workers exposed to it in the workplace. See *National Grain & Feed Ass'n* v. *OSHA*, 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

despite the notice given to all employers, was relatively sparse in the original proceeding. When the court nonetheless held that the existing record was adequate to make the feasibility determination and that any further fact-gathering constituted undue delay and must cease, the Secretary sought rehearing en banc. The Secretary argued that the court's order imposed unwarranted limitations on the Secretary's administrative discretion and that a supplemental notice-and-comment rulemaking would, by enhancing the evidentiary record, make an extended standard more fully supportable. Once the court failed to grant rehearing, however, the government decided against seeking certiorari in the belief that further proceedings were not essential, and that the court's action, though unwarranted, would not be fatal to a revised rule. The Secretary's belief proved to be correct: the court below held that, on the basis of the existing record, she made a rational and defensible decision to extend the hazard communication standard to the non-manufacturing sectors.

There is no basis for revisiting now the question of whether the court should have permitted the Secretary the opportunity to complete her supplemental fact-gathering. The Secretary complied fully with the court's order when she issued the revised standard, and that standard must be judged solely on the basis of whether it is supported by substantial evidence in the record under review. It is irrelevant at this point that the Secretary might have developed a more extensive record if she had been permitted to do so.[5]

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[5] Petitioner AGC (88-1070 Pet. 27-28; cf. 88-1075 Pet. 13-14) additionally complains that the court below deprived the parties of meaningful judicial review by holding that certain issues, specifically those relating to the notice and significant risk requirements, had previously

b. Petitioners challenge (88-1070 Pet. 16-19; 88-1075 Pet. 14-16; 88-1385 Pet. 27-28) the court's holding (88-1075 Pet. App. 11a-13a) that the Secretary validly based the revised standard on a general finding of significant risk. The assertion that this holding is in error or in conflict with prior decisions of this Court and other courts of appeals does not withstand scrutiny.

As the court noted (88-1075 Pet. App. 12a, citing *USWA I*, 763 F.2d at 738), the Secretary's significant risk

been decided in *USWA I* or *USWA II* and were consequently binding on the parties. 88-1075 Pet. App. 10a-11a; see also *id.* at 15a. According to AGC (Pet. 27), this application of stare decisis undermined traditional standing principles because petitioners, who were not covered under the original standard, could not previously have challenged it in the court of appeals. See 29 U.S.C. 655(f). The implication, AGC warns (88-1070 Pet. 27), is that "[t]o preserve their right to challenge these findings * * * petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector." But the court of appeals also made alternative holdings that, aside from stare decisis, it independently believed that the Secretary had met the relevant notice and significant risk requirements. 88-1075 Pet. App. 10a-11a. Furthermore, it is clear that the principle of stare decisis, as codified in Third Circuit Internal Operating Procedure 8C, applies regardless of whether the parties in this case participated in the earlier proceeding. The court's invocation of this principle was unexceptional, and, consistent with IOP 8C, if petitioners thought that de novo review was merited notwithstanding the circuit precedent, they should have sought rehearing en banc.

In any event, there is nothing ominous about the result predicted by petitioners. The rules on intervention permit non-parties the opportunity to protect their interests in ongoing litigation; and there is no incompatibility between saying petitioners had no standing to challenge the original standard and saying they could have intervened as respondents to defend the Secretary's decision to limit its scope. Moreover, it is noteworthy that AGC does not assert that the Secretary inadequately represented its interest on this point in *USWA I* and *II*. It is also noteworthy that petitioners successfully intervened in *USWA III*.

finding in the original rulemaking "applied to all workers who would be exposed to hazardous chemicals." See also *USWA I*, 763 F.2d at 738 (noting record evidence that employees in sectors other than manufacturing are also exposed to hazardous chemicals and are in need of hazard information). In particular, the Secretary made an across-the-board determination that "inadequate communication about serious chemical hazards endangers workers," that "the standard will increase employee awareness of the potential health and safety risks associated with industrial chemicals[,] should result in increased [employee] use of personal protective devices, improved work practices, and other precautionary measures [, and] * * * should result in more safety-enhancing investments" by employers due to their increased knowledge about safety and health hazards, and that consequently the standard can be expected to yield a long-term significant reduction in chemical-source illnesses and injuries. 48 Fed. Reg. 53,280, 53,321, 53,328-53,329 (1983). Thus, the Secretary did "not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards." *USWA II*, 819 F.2d at 1267 (quoting 48 Fed. Reg. 53,286 (1983)). Although the Secretary initially chose to limit the scope of the standard to the manufacturing sector,[6] it was precisely the in-

[6] In *USWA I*, the court stated that Section 6(g) of the OSH Act, 29 U.S.C. 655(g), while permitting the Secretary "to set priorities for the use of the agency's resources and to promulgate standards sequentially," could not be used to justify limiting the standard to the manufacturing sector where the Secretary had failed to explain "not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. AGC (88-1070 Pet. 25-26) urges this Court to grant review on this question of the Secretary's priority-setting discretion. The govern-

congruity between her general risk findings and the standard's limited scope that prompted the court to confine its remand to the feasibility of the standard, as opposed to its need, in the non-manufacturing sectors. 88-1075 Pet. App. 12a; *USWA II*, 819 F.2d at 1267, 1270; *USWA I*, 763 F.2d at 737, 739.[7]

Moreover, in the course of making her post-remand feasibility determination, the Secretary "accumulated evidence to indicate that some employees in every SIC code designation are exposed to hazardous chemicals." 52 Fed. Reg. 31,852, 31,858 (1987); compare 48 Fed. Reg. 53,280, 53,284-53,286 (1983). She specifically referred to record evidence on the need for the standard for supermarket workers, hospital workers, barbers and beauticians, longshore workers, utility workers, dry cleaning and laundry workers, and farmworkers. 52 Fed. Reg. 31,852, 31,857 (1987). She also emphasized the long history of consultation with the OSHA Advisory Committee on Construction Safety and Health, which has repeatedly recommended a hazard communication standard for construction workers and estimated that 70% of all construction workers are exposed to chemical hazards. *Id.* at 31,857-31,858, 31,871 (Table 2; SIC codes 15-17).

The court of appeals was thus correct to conclude that the Secretary's significant risk determination met the threshold requirement for the issuance of an OSHA stand-

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ment, however, did not seek certiorari on this ruling and believes that the Secretary's subsequent extension of the standard to cover all employers has mooted the issue.

[7] See 50 Fed. Reg. 48,794, 48,795 (1985) ("the need for the standard has already been demonstrated, and the information required at this point is to establish the current status of hazard communication within the industries outside manufacturing, and the appropriateness of covering those industries in a manner similar to the coverage of manufacturing in the current rule").

ard. The purpose of the rulemaking was to develop a generic hazard communication standard. The Secretary's focus was therefore appropriately on whether the general failure of chemical manufacturers to disseminate adequate information about hazardous chemicals and of employers to provide their employees with such information posed a significant occupational safety and health risk and on whether OSHA could significantly reduce this risk through the development of appropriate standards. Having found, as a general matter, that a uniform hazard communication standard was necessary to remedy this universal problem (see, *e.g.*, 52 Fed. Reg. 31,850, 31,859 (1987) (discussing need for a single standard), 48 Fed. Reg. 53,280, 53,323-53,324 (1983) (discussing market failure)), the Secretary was under no further obligation to repeat her risk analysis for each of the 70 two-digit SIC codes that encompass the entire spectrum of economic activities in the private sector. Indeed, as the court below accurately concluded, "[a] requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible." 88-1075 Pet. App. 13a.[8]

Accordingly, contrary to petitioners' contentions (88-1070 Pet. 18; 88-1075 Pet. 14, 16; 88-1385 Pet. 27-28), the decision below is not at all in conflict with *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607

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[8] In issuing the standard, the Secretary estimated that there were as many as 575,000 hazardous chemical products, with thousands more introduced every year. 48 Fed. Reg. 53,280, 53,323 (1983).

(1980) (plurality opinion), in which the significant risk requirement under the OSH Act was first discussed. As this Court there explained, Section 3(8) of the OSH Act, 29 U.S.C. 652(8), requires the Secretary to find that a standard is reasonably necessary and appropriate to remedy significant workplace risks. 448 U.S. at 639. Nothing in that decision suggests, however, that a standard aimed at risks common to all industries is invalid unless the Secretary has first established the significance of the risk and the efficacy of the required practices in each and every one of the affected sectors. On the contrary, the Court emphasized that the Secretary, who retains the discretion to define the acceptable level of risk, "has no duty to calculate the exact probability of harm" and "is free to use conservative assumptions in interpreting the data * * *, risking error on the side of overprotection rather than underprotection." 448 U.S. at 655-656. Significantly, the Court also noted that the Secretary may impose certain "information-gathering" requirements below the level of risk needed to establish a permissible exposure limit for a specific toxic substance as a means of protecting unusually susceptible individuals or determining whether lower limits should be set. *Id.* at 658 & n.66. See also *id.* at 662-664 (Burger, C.J., concurring) (the Secretary has substantial discretion in making significant risk determinations). The lower court's recognition (88-1075 Pet. App. 13a) that a "general finding [of significant risk] concerning all potentially covered industries" must of necessity be sufficient to support a "performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries" therefore is fully consistent with *Industrial Union Department.*[9]

[9] Petitioners also err in asserting (88-1075 Pet. 14; 88-1385 Pet. 27) that the decision below conflicts with *American Textile Mfrs. Inst.* v.

Petitioners' contention (88-1070 Pet. 16-18; 88-1075 Pet. 15; 88-1385 Pet. 27-28) that this Court's review is warranted because the decision below conflicts with decisions of the Fourth, Fifth and District of Columbia Circuits dealing with the significant risk requirement also misses the mark. In *Texas Indep. Ginners Ass'n* v. *Marshall,* 630 F.2d 398, 406-409 (1980), the Fifth Circuit struck down the Secretary's standard for the cotton ginning industry in part for failure to make an adequate significant risk finding.[10] There, the Secretary had determined that a different standard than the one she had issued for the rest of the cotton industry was necessary to protect cotton gin workers, but she had not supported this determination with substantial evidence of significant risk at the much lower exposure levels and in the less harmful working conditions that are prevalent in the domestic cotton ginning industry. Here, by contrast, the Secretary recognizes the need for a uniform hazard communication standard to cover all industries because lack of information about a hazardous chemical poses a significant risk to a worker regardless of the exact conditions of use and because the chemical manufacturers, who must bear the primary responsibility for providing hazard information, generally distribute the chemicals in a single stream of commerce.

Donovan, 452 U.S. 490, 536-540 (1981). The Court there invalidated a portion of the OSHA cotton dust standard because the Secretary had included a wage guarantee requirement for reasons of general fairness unrelated to safety and health; the Court nowhere held that the OSH Act requires a separate significant risk justification for each provision of a standard when the goal to advance occupational safety and health is not in doubt.

[10] The Fifth Circuit's independent holding that the standard was invalid because the Secretary failed to perform cost-benefit analysis was discredited by this Court in *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. 490, 510-511 n.30 (1981).

See 52 Fed. Reg. 31,852, 31,859, 31,864 (1987); 48 Fed. Reg. 53,280, 53,295-53,296 (1983). Moreover, *Texas Independent Ginners* involved a standard setting, *inter alia*, specific control requirements. There is a fundamental distinction between that kind of standard and a performance-oriented, informational standard such as hazard communication. See 88-1075 Pet. App. 13a; *Louisiana Chemical Ass'n* v. *Bingham*, 550 F. Supp. 1136, 1146 (W.D. La. 1982), aff'd per curiam, 731 F.2d 280 (5th Cir. 1984); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 580 (1979).

The other two cases relied on by petitioners are simply inapposite. In *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1454-1455 (1985) (en banc), the Fourth Circuit ruled that the Secretary acted within her discretion when she included the tree care industry within the general hearing conservation standard, even though that industry purportedly has many of the same characteristics as the oil and gas drilling industry, which the Secretary had decided to exclude from the general standard and to cover in a separate comprehensive standard. And in *United Steelworkers of America* v. *Marshall*, 647 F.2d at 1309-1310, the D.C. Circuit upheld the Secretary's exclusion of the construction industry from the lead standard on grounds of feasibility, not significant risk.

In sum, nothing in these cases stands for a general legal principle that the Secretary must separately assess the risk in every industry to be covered by a single standard once the Secretary has determined that they all share a common significant risk or that the Secretary is required under the "reasonably necessary and appropriate" language of Section 3(8) to subject each facet of such a standard to

industry-by-industry risk analysis. See 88-1070 Pet. 21-23; 88-1075 Pet. 14-15; 88-1385 Pet. 28.[11]

c. Petitioners' argument (88-1070 Pet. 19-21; 88-1075 Pet. 16-18; 88-1385 Pet. 28-29) that the court improperly shifted the Secretary's burden of proving the technological and economic feasibility of the standard is also erroneous. Under the statute, the Secretary must issue toxic substance standards that "to the extent feasible" assure that no worker is subject to material harm resulting from hazardous working conditions. 29 U.S.C. 655(b)(5). The Secretary's burden is therefore to establish, by substantial evidence, that the standard does not exceed the limits of technological or economic feasibility. *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. at 508-509, 513 n.31. The court of appeals' observation that the rulemaking record "contained no credible evidence that the standard would be technologically or economically infeasible" (88-1075 Pet. App. 14a) in the non-manufacturing sector

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[11] In any event, there can be no doubt that there is a significant risk in the construction industry, where more than 70% of all employees are exposed to hazardous chemicals. See 52 Fed. Reg. 31,852, 31,871 (1987) (Table 2; SIC codes 15-17). Moreover, contrary to petitioner ABC's argument (88-1075 Pet. 15), this risk is not eliminated by existing OSHA requirements (29 C.F.R. 1926.21) that construction workers be trained in the use of hazardous materials because, absent the hazard communication standard, there is no corresponding obligation for suppliers to provide the necessary hazard information to the contractors and no requirement for the maintenance on site of warning labels and material safety data sheets or for the development of written hazard communication plans. 88-1075 Pet. App. 13a. Likewise, the hazards associated with grain dust are well known and establish the existence of a significant risk in the grain and feed industry warranting its coverage by a hazard communication standard. *Ibid.* See *National Grain & Feed Ass'n* v. *OSHA,* 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

constitutes a finding that the Secretary met that burden here.

Indeed, the Secretary not only concluded that the record contained no "credible evidence indicating the standard would be infeasible for any individual sector"—thereby responding to the exact terms of the remand order in *USWA II*, 819 F.2d at 1270—but she also affirmatively found that "the original record on the whole supports a finding that the performance-oriented [standard] is feasible for all industries." 52 Fed. Reg. 31,852, 31,855 (1987). The Secretary based this finding in part on the fact that feasibility had already been established in the manufacturing sector, in which the chemical manufacturers in particular bear by far the largest compliance burden of any employer group; in part on experience gained under the original standard and in states that had already extended hazard communication requirements to the non-manufacturing sectors; and in part on record evidence from employers and employees in the non-manufacturing sectors indicating that the standard would be practical in their sectors. 52 Fed. Reg. 31,853, 31,855-31,857 (1987). The Secretary found further support for her finding in a post-remand regulatory analysis that quantified the Secretary's cost estimates on an industry-by-industry and establishment-size basis and concluded that the costs for the non-manufacturing sectors (including construction) would fall within the ranges already established and determined to be reasonable for the manufacturing sector. *Id.* at 31,869-31,874; compare 48 Fed. Reg. 53,280, 53,332-53,334 (1983).[12]

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[12] This regulatory analysis, together with other evidence that was accumulated since *USWA I*, filled in the perceived gaps in the original record that the Secretary identified in the rehearing petition following *USWA II*. See 88-1070 Pet. 10-11. Furthermore, the Secretary

Thus, the court of appeals not only applied a correct legal test, but it properly concluded that the standard's requirements "hardly approach the limits of feasibility" and that the Secretary's feasibility determination for the non-manufacturing sectors "is on the agency record completely supportable" (88-1075 Pet. App. 14a). That determination does not warrant further review.

d. Petitioner NGFA additionally contends (88-1385 Pet. 9-19) that the court of appeals erred in upholding the Secretary's reliance on the ACGIH *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* (latest edition) (TLV list) to provide a mandatory floor of hazardous substances that are automatically covered by the hazard communication standard. The principal argument (88-1385 Pet. 10-14) is that the Secretary is required to make a significant risk determination with respect to each regulated substance, and that the Secretary never made that threshold determination concerning grain dust and other substances included in the TLV list, because that responsibility has been unlawfully delegated to a private organization.

This argument is deeply flawed. Like the significant risk challenge discussed above, NGFA's delegation argument is based on the fundamental misperception that the

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recognized that the issue with respect to the non-manufacturing sectors was largely "the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training." *USWA II*, 819 F.2d at 1266. See also *id.* at 1267; *USWA I*, 763 F.2d at 738-739. The Secretary intentionally designed a performance-oriented standard permitting an individual employer to adopt different cost-effective strategies for meeting the standard's requirements and made several changes in the standard to make it more suitable for non-manufacturing workplaces. 52 Fed. Reg. 31,852, 31,860 (1987); 48 Fed. Reg. 53,280, 53,281-53,282 (1983); 88-1075 Pet. App. 9a, citing *USWA III*, 855 F.2d at 113.

Secretary was under an obligation to determine separately the risk associated with each substance potentially covered by the standard. Rather, the Secretary was required to determine that lack of hazard communication generally posed a significant risk to workers, and that a standard was reasonably necessary and appropriate to reduce the risk. Thus the focus of the rulemaking was appropriately directed toward defining the categories of hazards (not specific chemicals) to be covered by the standard and toward developing a workable methodology for establishing which chemicals would be subject to the standard's hazard communication requirements.

Based on an extensive rulemaking record, the Secretary determined that the most protective hazard communication standard could be achieved only by placing the responsibility for hazard determination on the chemical manufacturers. 48 Fed. Reg. 53,280, 53,286-53,289 (1983); 88-1075 Pet. App. 15a; *USWA I*, 763 F.2d at 739 (upholding OSHA's hazard determination procedure over the suggested alternative of exclusive reliance on government-generated lists of hazardous chemicals). See 29 C.F.R. 1910.1200(c) (definitions of "health hazard" and "physical hazard"), (d) ("hazard determination"), and Appendices A-C.[13] NGFA does not challenge the Secre-

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[13] More specifically, the standard requires each chemical manufacturer or importer to evaluate the hazards of chemicals produced in its workplace or imported by it. 29 C.F.R. 1910.1200(d). The standard sets out the categories of health and physical hazards to be evaluated, provides criteria for evaluating the "available scientific evidence" on each hazard category, and includes a non-mandatory list of references that could aid the hazard determination process. 29 C.F.R. § 1910.1200(c), (d), and Appendices A-C. According to the prescribed criteria, the chemical manufacturer or importer must treat as hazardous—and therefore develop a container label for and MSDS including the relevant hazard information on—any chemical for which

tary's imposition of that duty on the chemical manufacturers. Yet, the Secretary's incorporation of certain mandated lists, including the TLV list, into this requirement was part and parcel of this regulatory decision; having invested the chemical manufacturers with considerable discretion to determine which chemicals are hazardous, she determined the need to limit that discretion by, among other methods, putting an objective "floor" under the hazard determination process. 48 Fed. Reg. 53,280, 53,299, 53,336 (1983).[14]

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there is "at least one positive study conducted in accordance with established scientific principles" finding adverse health effects, as defined by the standard. 29 C.F.R. § 1910.1200(d)(2). In addition, the standard mandates that the chemical manufacturer or importer shall consider to be hazardous any chemical that is included on one of several well-known lists of hazardous chemicals. 29 C.F.R. § 1910.1200(d)(3), (4). One of the prescribed sources of information is the latest edition of the ACGIH TLV list. 29 C.F.R. § 1910.1200(d)(3)(ii).

ACGIH "is an impartial scientific organization which identifies safe exposure levels for various substances." 88-1075 Pet. App. 15a. Its membership is limited to professionals in governmental agencies or educational institutions engaged in occupational safety and health programs. A TLV (threshold limit value) is a recommended airborne concentration and represents conditions under which nearly all workers may be repeatedly exposed daily without adverse effect. ACGIH's TLVs are established by committees of recognized experts who review the available scientific literature. For instance, before adopting a TLV for grain dust, it solicited public comment and relied on 36 scientific studies or reports. ACGIH, *Documentation of the Threshold Limit Values and Biological Exposure Indices* 288-289.2 (5th ed. 1986). The ACGIH TLV list, which currently includes approximately 600 substances, is updated annually.

[14] At bottom, the TLV list simply provides a readily-available source of credible scientific information. For example, NGFA strenuously objects to ACGIH's inclusion of oat, wheat, and barley dust on its TLV list. But as noted *supra* (note 13), ACGIH based its

The inclusion of mandated lists was thus a common sense response to apparent deficiencies in the proposed hazard determination process, which assigned chemical manufacturers the responsibility for making hazard determinations without a corresponding check on their broad discretion. 47 Fed. Reg. 12,092, 12,121, 12,123 (1982 proposal). See 48 Fed. Reg. 53,280, 53,286-53,288 (1983 discussion of rulemaking record). In particular, the Secretary's choice of the TLV list to form a floor under the hazard determination process responded to repeated comments that the list is routinely used by responsible industrial hygienists as an authoritative source of information on well-known hazardous substances. *Ibid.*[15]

The court correctly concluded (88-1075 Pet. App. 15a) that the use of the TLV list in conjunction with the chemical manufacturers' independent duty to research and assess hazards was both "appropriate" and fully consistent

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TLV for grain dust on 36 scientific studies and reports. If only one of these contains "evidence which is statistically significant" and was based on a study "conducted in accordance with established scientific principles," the standard requires grain dust to be treated as a health hazard *regardless* of its status on the TLV list. 29 C.F.R. 1910.1200(d)(2). Moreover, "the propensity of grain elevators to blow up" (88-1075 Pet. App. 13a) makes grain dust, in any event, a "physical hazard" subject to the standard. As a practical matter, therefore, the inclusion in 1986 of oat, wheat, and barley dust on the TLV list did not significantly add to the obligations that employers in the grain industry incurred when the standard was extended to apply to non-manufacturers.

[15] Interested parties, including NGFA, had every opportunity to participate in the rulemaking and to add to the record on appropriate hazard determination methods. Furthermore, Section 6(f) of the OSH Act, 29 U.S.C. 655(f), provided them with the right to seek pre-enforcement judicial review of the Secretary's regulatory decision. There was accordingly no unfairness in the way the Secretary incorporated the TLV list into this standard.

with the Secretary's statutory authority to set standards.[16] The hazard determination scheme, including the incorporation of the mandated lists, was obviously in fulfillment, not derogation, of this mandate.[17]

Furthermore, NGFA clearly misses the mark (88-1385 Pet. 19-22) when it argues that the Secretary somehow crossed the line that demarcates constitutional delegations

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[16] Congress directed the Secretary to achieve the OSH Act's goal of safe and healthful working conditions for all Americans in part by "developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. 651(b)(5). Moreover, Section 6(b)(5), 29 U.S.C. 655(b)(5), which governs the issuance of toxic substance standards, directs the Secretary to base the standards on "the best available evidence" and with due consideration given to "the latest available scientific data"; it also states a preference for standards expressed in terms of "objective criteria and of the performance desired." In addition, Section 6(b)(7), 29 U.S.C. 655(b)(7), prescribes standards for labels and other forms of warning to "insure that employees are apprised of all hazards to which they are exposed." Cf. 29 U.S.C. 657(g)(2) (the Secretary has general authority to "prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities under this [Act]"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980).

[17] NGFA argues (88-1385 Pet. 14-18) that Congress could not have intended the Secretary to incorporate the recommended standards of private organizations into Section 6(b) standards because, in Section 6(a), it specifically authorized the adoption, without rulemaking, of previously-established national consensus and federal standards for only the first two years following the effective date of the OSH Act. See 29 U.S.C. 655(a). The fact, however, that Congress, out of concern for procedural fairness to the regulated community, limited the time in which the Secretary was permitted to adopt existing standards as final OSHA standards without full rulemaking does not imply that it similarly prohibited the Secretary from concluding, based on a complete rulemaking record, that the incorporation by reference of particular hazard determinations in a private standard into a comprehensive Section 6(b) standard is reasonably necessary or appropriate.

of rulemaking authority.[18] This Court has long recognized that the legislature—or, as in this case, a standard-setting agency acting pursuant to delegated authority—may seek private assistance in "matters of a more or less technical nature." *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 537 (1935). See *Cospito* v. *Heckler,* 742 F.2d 72, 87-88 n.25 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985). In general, delegations of this sort pass constitutional muster so long as the delegatee provides needed practical expertise, is not likely to exercise its limited authority in a biased or self-aggrandizing manner, and does not replace the governmental entity as the ultimate policymaker regarding the matter being regulated. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398-400 (1940). These criteria are obviously satisfied in this case.[19]

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[18] Significantly, the courts of appeals uniformly have upheld the constitutionality of the Secretary's authority to issue Section 6(a) standards, which, as noted *supra* (note 17), involve the wholesale adoption, without rulemaking, of national consensus standards developed by certain private organizations. *Towne Constr. Co.* v. *OSHRC,* 847 F.2d 1187, 1189 (6th Cir. 1988); *Modern Drop Forge Co.* v. *Secretary of Labor,* 683 F.2d 1105, 1110 (7th Cir. 1982); *Noblecraft Indus., Inc.* v. *Secretary of Labor,* 614 F.2d 199, 203 (9th Cir. 1980). Moreover, many of these Section 6(a) standards themselves incorporate privately established standards by reference. *Towne Constr. Co.,* 847 F.2d at 1189. Cf. *Todd & Co.* v. *SEC,* 557 F.2d 1008, 1012 (3d Cir. 1977) (upholding SEC's reliance on private security dealer association's disciplinary procedures).

[19] The Secretary did not delegate to ACGIH the policy-making role of setting a hazard communication standard or even of devising the requirements for hazard determination; rather, the Secretary simply required the use of ACGIH's existing TLV list, among other specified lists and criteria, as a source of public information in the hazard determination process. Moreover, the Secretary adopted ACGIH's TLV list

2. Petitioner ABC also challenges (88-1075 Pet. 18-19) the court of appeals' decision in *USWA III*, which held that OMB lacked authority under the Paperwork Reduction Act to disapprove certain provisions of the Secretary's hazard communication standard. The Acting Solicitor General has filed a petition for a writ of certiorari challenging that decision as well. See *Dole* v. *United Steelworkers of America,* No. 88-1434 (filed Feb. 27, 1989). We suggest that this Court grant the government's petition, rather than ABC's. First, as ABC seems to recognize (88-1075 Pet. 18-19), the question presented by that case is far more important to the federal government than to any individual litigant. As the government's petition explains in detail, the court of appeals' decision will substantially interfere with OMB's responsibility to review a wide range of federal information collection activities. Second, ABC's petition primarily challenges the *Associated Builders* decision, and provides only a cursory discussion of issues presented by the *USWA III* decision.

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with full knowledge that ACGIH is a well-respected professional organization with specific expertise in the area of hazard determination, that it is not itself a chemical manufacturer with responsibility for hazard determinations under the standard or in an adversarial position vis-à-vis any segment of the regulated community, and that the TLV list historically has been developed based on stringent scientific criteria.

NGFA makes much of the fact (88-1385 Pet. 13, 22) that ACGIH is not bound by the same procedural and substantive limitations that constrain the Secretary in setting OSHA standards. But neither are the chemical manufacturers when they perform hazard determinations, nor, for that matter, are the scientists upon whose studies they must base their evaluations. Quite simply, hazard determination, whether done by ACGIH or a chemical manufacturer, is not the same as standard-setting. Moreover, if the regulated community has a credible basis for objecting to ACGIH's future hazard determinations, it may petition the Secretary for modification of the standard. See 29 U.S.C. 655(b); 29 C.F.R. 1911.3.

And third, ABC, which was an intervenor in *USWA III*, will have a full opportunity to present its views as a respondent to the government's petition. Under these circumstances, we believe that it would be appropriate to deny ABC's petition in full.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,

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THE NATIONAL GRAIN & FEED ASSOCIATION, INC., *et al.*,

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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

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QUESTIONS PRESENTED

The *certiorari* petitions in these cases challenge 7 aspects of OSHA's Hazard Communication Standard and the Third Circuit's decisions reviewing that Standard:

(a) the Third Circuit's factual determination that petitioners received adequate notice that the Hazard Communication Standard might be applied to their industry;

(b) the Third Circuit's statement that petitioners should be foreclosed from raising issues settled in prior litigation in which petitioners could have intervened, where the Third Circuit nevertheless proceeded to consider and reject petitioners' contentions on the merits;

(c) OSHA's factual determinations accepted by the Third Circuit regarding the existence of a "significant risk" in the affected industries;

(d) OSHA's factual determinations accepted by the Third Circuit that compliance with the Standard is feasible for the affected industries;

(e) petitioners' contention that the Standard—whose provisions plainly have a health-protective purpose and are not merely redundant of existing protective requirements—is not "reasonably necessary or appropriate";

(f) the Third Circuit's rulings in two earlier related proceedings that OSHA's original Standard arbitrarily and capriciously failed to cover employees subject to the significant risks the Standard is intended to correct, which petitioners contend constituted improper interference with OSHA's setting of rulemaking priorities;

(g) OSHA's determination, after full rulemaking, that the findings of a private scientific body provide an appropriate base for listing a chemical as a hazardous substance for purposes of the Standard.

The question presented is whether any of these determinations are worthy of this Court's review.

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---

BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1070 ("AGC Pet."), 88-1075 ("ABC Pet.") and 88-1385 ("NGFA/UT Pet."), insofar as those petitions seek review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988) ("*ABC v. Brock*").[1]

STATEMENT

1. The Provisions of the Hazard Communication Standard.

To enable employees to protect themselves from threats to their health, the regulation at issue here—the Hazard Communication Standard ("HCS" or "the Standard") promulgated by the Occupational Safety and Health Administration ("OSHA" or "the Agency")—requires employers to provide employees with basic information concerning hazardous substances found in the workplace, through a combination of methods including labeling, material safety data sheets ("MSDSs") and training.

The lion's share of the responsibilities created by the HCS falls on chemical manufacturers, importers and (to a lesser extent) distributors. The manufacturers and importers have the obligation under the Standard to "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1). In addition, manufacturers and importers must treat as "hazardous" chemicals appearing on either of two lists: (1) the list of substances for which OSHA has established exposure limits in the standard

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[1] The petition for certiorari in No. 88-1075 also seeks review of the decision in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"). The position of USWA and BCTD with respect to that decision is set out in their brief in opposition filed this date in *Elizabeth Dole, et al. v. United Steelworkers of America, et al.*, No. 88-1434.

for Air Contaminants that appears at 29 C.F.R. Part 1910, Subpart Z; and (2) the latest edition of *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, which is published and updated annually by the American Conference of Governmental Industrial Hygienists ("ACGIH").[2] 29 C.F.R. § 1910.1200(d)(3). The manufacturers and importers must "obtain or develop a material safety data sheet for each [such] hazardous chemical," § 1910.1200(g)(1), and must "ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment" of a hazardous substance "and with the first shipment after a material safety data sheet is updated," § 1910.1200(g)(6). Chemical manufacturers, importers, and distributors must also "ensure that each container of hazardous chemicals leaving the workplace is labeled" with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

Other employers, including the construction industry petitioners in Nos. 88-1070 and 88-1075, have much less extensive obligations under the HCS; these employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. These employers must: (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8);[3] (2) see to it that containers of hazardous chem-

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[2] ACGIH is a professional society whose membership consists of occupational health professionals who work for governmental agencies and educational institutions. Chemicals appearing on the Threshold Limit Values list are those that ACGIH has determined pose a health risk to employees who are exposed to them above a certain concentration.

[3] Where employees must travel between workplaces during a shift, "the material safety data sheets may be kept at a central location at the primary workplace facility." § 1910.1200(g)(9). At multi-employer workplaces, if the circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter

icals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200 (f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop, implement, and maintain a written hazard communication program that describes how the employer will meet the HCS's requirements as described above, § 1910.1200(e)(1).

2. History of the Regulation.

The rulemaking that culminated in the HCS was initiated by a Notice of Proposed Rulemaking published on March 19, 1982. *See* 47 Fed. Reg. 12092 *et seq.* (1982). In that notice OSHA proposed to limit the scope of the Standard to (i) chemical manufacturers and (ii) employers in the manufacturing sector as defined by Standard Industrial Classification (SIC) Codes 20 through 39. *Id.* at 12092, 12101, 12119. In support of the latter limitation, the Agency stated that "[i]t appears that employees in manufacturing facilities are at the greatest risk of harmful exposure to chemicals." *Id.* at 12101.

However, OSHA's notice made it clear that the question of the scope of the Standard had not been finally resolved, but was a matter to be determined in the rulemaking. Stating that "*[t]he scope of the [proposed] standard could have been* limited only to chemical manufacturers (SIC 28), or could have been *broadened to include all employers in all workplaces*," *id.* at 12101 (emphasis added), OSHA concluded its discussion of this aspect of the proposal with the following words: "*Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.*" *Id.* at 12102 (emphasis added).

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must either provide copies of the MSDSs for such chemicals to the other employer, "or . . . make [them] available at a central location in the workplace." § 1910.1200(e)(2)(i).

In opening the rulemaking hearings, OSHA's Director of Health Standards Programs reiterated that the scope of the Standard was "certainly an open issue," and one on which the Agency "welcome[d] additional comment." [4] He added:

> . . . [T]he objective in a hearing like this is to try to get suggestions from interested parties as to what the agency should do and *the preliminary proposal to narrow the scope of the standard* to just those . . . [SIC] codes *is just that, it's a preliminary proposal.*
>
> * * * *
>
> The agency's mind is not made up on that and we're ready to listen to anything and to accept any kind of evidence, orally or in writing, which you might have.
>
> * * * *
>
> The scope of the standard will be determined by the evidence presented. *The evidence will dictate what we do. Now if the evidence supports going beyond SIC Codes 20 through 39, we'll go beyond SIC Codes 20 through 39.*
>
> * * * *
>
> For that reason, we're having hearings across the country and obtaining new current information.[5]

In response to OSHA's notice, extensive evidence was submitted in the rulemaking proceedings supporting the application of the Standard to non-manufacturing industries,[6] including specifically the construction industry.[7]

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[4] *Informal Public Hearings on Hazard Communication before the Occupational Safety and Health Administration* (1982), transcript p. 14 (testimony of R. Leonard Vance).

[5] *Id.* at 27-30 (emphasis added).

[6] *See e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 411-13, 417-18, 606-07, 1354-55, 1360, 1470, 2123-24, 2193-97, 2254-61, 2653-54, 2808-09, 2936-37, 3036, 3077-79, 3597-98, 3814-27, and the following exhibits introduced therein: 19-109; 19-161; 36; 49; 52C; 62; 111; and 122.

[7] *See, e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 2123-24 (Rodney Wolford of the International Brother-

At the conclusion of the rulemaking, OSHA promulgated a final standard in November 1983. *See* 48 Fed. Reg. 53280 *et seq.* (1983). The scope of that Standard was broader than had been proposed in the March 1982 notice in one respect: where the proposal had required only chemical *manufacturers* to perform hazard evaluations and to prepare MSDSs and labels, the Standard as promulgated required chemical *importers* (and, in some instances, chemical *distributors* as well) to do the same. § 1910.1200(d)(1), (f)(1), (g)(1); 48 Fed. Reg. 53286-87, 53342-43. However, as in the March 1982 proposal, all other provisions of the final Standard were limited to employers in the manufacturing sector, *i.e.* SIC Codes 20 through 39.

In the preamble to the Standard, OSHA discussed its decision on the scope issue at length, characterizing that issue as one of the key "technical and policy issues raised by the proposed standard." *Id.* at 53284. Acknowledging that much evidence had been offered to support the proposition that the scope of the Standard should be expanded to include non-manufacturing industries, *id.* at 53286, OSHA explained its decision as follows:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need. [*Id.*]

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hood of Painters and Allied Trades (IBPAT)) (paint applicators in construction need HCS at least as much as those in manufacturing); Exh. 19-161 at 6 (IBPAT) ("the [health] problems and solutions for the paint and allied trades industry extend from the manufacturer through the applicator without regard for artificial distinctions such as SIC Codes"); Exh. 36 at 12-13 (AFL-CIO) (need for HCS "is as great in construction as in manufacturing"); Exh. 49 at 6-7 (UAW).

USWA and others filed petitions for review of the 1983 Standard. USWA contended, *inter alia*, that OSHA's decision to limit the Standard to the manufacturing sector was not supported by the rulemaking record, while petitioner Public Citizen attacked OSHA's determination not to adopt the *Registry of Toxic Effects of Chemical Substances* ("RTECS") published by the National Institute for Occupational Safety and Health ("NIOSH") as the base list of chemicals deemed to be hazardous.[8]

On review, the Third Circuit held that OSHA's rationale for confining the Standard to manufacturing "does not withstand . . . scrutiny." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) (*"USWA I"*), AGC Pet. App. at 41a.[9] That court noted that OSHA's reasoning failed even to "address the . . . contention" that because the hazards dealt with by the Standard cut across all SIC Codes, it is irrational to limit the HCS to particular SIC Codes. AGC Pet. App. at 39a. And the Third Circuit recognized that OSHA's sole rationale for limiting the Standard to the manufacturing sector—namely, the contention that employees in that sector, taken as a whole, experience a higher rate of illness from exposure to hazardous chemicals than employees in other sectors—was doubly flawed. First, OSHA's contention was, at best, a gross overgeneralization, *see* AGC Pet. App. at 37a-38a; and second, even to the extent that the generalization might be sound, it would only provide a reason "why the . . . [HCS should apply to] employees in the manufacturing sector, [and would not explain] why the same information is not needed for workers in other sectors. . . ." AGC Pet. App. at 41a.

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[8] The RTECS list contains far more substances than the two lists adopted by OSHA. *See* 48 Fed. Reg. 53298 (1983).

[9] References to "AGC Pet. App." are to the Appendix to the Petition for Certiorari in No. 88-1070.

Relying on § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which expressly mandates OSHA to promulgate standards that are designed to assure that "*no* employee will suffer material impairment of health,"[10] the Third Circuit directed the Secretary "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." AGC Pet. App. at 42a. As that court subsequently explained, "[t]hat holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees." *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1267 (3d Cir. 1987) (*"USWA II"*), AGC Pet. App. at 63a.[11]

Instead of proceeding promptly to the reconsideration that had been ordered by the Third Circuit, OSHA delayed, and did nothing except to publish an Advance Notice of Proposed Rulemaking ("ANPR") soliciting public comment on various matters relating to industries not covered by the HCS. *See* 50 Fed. Reg. 48794 *et seq.* (1985). At that juncture USWA returned to the Third Circuit, filing a motion to enforce the order that court

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[10] Section 6(b)(5) provides in pertinent part that "[t]he Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . ., shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *See infra* at 20.

[11] The Third Circuit also rejected Public Citizen's challenge to OSHA's decision not to incorporate the RTECS list, holding that OSHA acted properly on the basis of its finding that the RTECS list was both overinclusive and underinclusive for this purpose. AGC Pet. App. at 42a.

had entered in *USWA I*. In *USWA II* the Third Circuit granted USWA's motion in pertinent part, concluding that the "further inquiry" in which OSHA was engaged "was unnecessary." AGC Pet. App. at 65a. That court held that the rulemaking proceedings conducted prior to the promulgation of the 1983 HCS had given adequate notice to all employers that the standard might cover non-manufacturing industries, and that there was no reason to conduct further proceedings because the original rulemaking record provided a proper basis for determining the final scope of the Standard. AGC Pet. App. at 65a-68a.[12]

Having determined that OSHA was unreasonably delaying the extension of the HCS to other industries, the Court of Appeals issued the following order, AGC Pet. at 68a (footnote omitted):

> [W]e will direct that the Secretary shall, within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard commu-

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[12] In that connection that Third Court noted that the 1983 Standard covered importers and distributors, even though the 1982 Notice had not done so:

> Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed. Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption. [*USWA II*, AGC Pet. App. at 67a.]

> nication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Subsequently, on August 24, 1987, OSHA promulgated the Standard at issue here, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). In addition to expanding the coverage, OSHA modified the HCS in certain respects to "tailor" the Standard to fit the characteristics of the newly included industries. *Id.* at 31858. These modifications include provisions regarding multi-employer and multi-site workplaces, *see supra* note 3, and broadened exemptions from the Standard's requirements for certain drugs and consumer products, *see* 29 C.F.R. § 1910.1200 (b) (6) (vii), (viii); 52 Fed. Reg. 31862.[13]

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[13] On September 10, 1987, OSHA submitted the revised HCS to the Office of Management and Budget for review under the Paperwork Reduction Act. On the basis of its review OMB "disapproved" three provisions of the Standard: (1) the requirement that employers at multi-employer worksites exchange their MSDSs, either individually or through a central location, § 1910.1200(e)(2); (2) the new consumer product exemption, § 1910.1200(b)(6)(vii), which OMB opined should be broadened even more; and (3) the new exemption for drugs, § 1910.1200(b)(6)(viii), which OMB likewise stated should be broadened. OMB announced that these "disapproved" provisions could not go into effect. See *USWA III*, ABC Pet. App. at 29a.

In *USWA III* the Third Circuit overturned OMB's action, and directed the Secretary to put the "disapproved" provisions into effect. This decision is challenged in the certiorari petitions in Nos. 88-1075 and 88-1434. As noted above, the position of USWA and BCTD with respect to this matter is set out in their brief in opposition in No. 88-1434.

Most recently, OSHA has sought additional comments from the public, to guide the Agency in considering further modifications of the Standard; the notice of proposed rulemaking is published at 53 Fed. Reg. 29822. The period for submitting comments has now closed, and final action by OSHA is pending.

3. The Decision Below.

In *ABC v. Brock*, the Third Circuit rejected industry petitions for review of the revised HCS. That court determined, *inter alia*, (i) that all employers had received fair notice in the 1982 rulemaking proceedings that the Standard might be applied to their industries, *see* AGC Pet. App. at 10a-11a; (ii) that the "significant risk" requirement of the OSH Act was satisfied by OSHA's "significant risk finding [which] applied to all workers who would be exposed to hazardous chemicals," *id.* at 12a; (iii) that OSHA's findings satisfied the "feasibility" requirement of § 6(b)(5) of the Act, *id.* at 13a-14a; and (iv) that in adopting the ACGIH Threshold Limit Values list as one of the base lists of hazardous substances for purposes of the HCS, OSHA did not unlawfully delegate its rulemaking authority to a private body, *id.* at 15a.

ARGUMENT

The *certiorari* petitions to which we respond are like supertankers filled with soapsuds: those petitions contain a great volume of froth without any substance. As we demonstrate point-by-point, the questions presented concern in the main fact-bound issues generated by applying correct—indeed undisputed—legal principles to the situation at hand, none of which warrants this Court's attention and all of which were correctly resolved below. Moreover, while petitioners claim otherwise, it is perfectly clear that the decisions below are *not* in conflict with the decisions of this Court or of any of the other courts of appeals. The petitions should be denied.

1. The Rulemaking Notice: Petitioners challenge, as "clearly erroneous," ABC Pet. at 13, the Third Circuit's determination that non-manufacturing employers received adequate notice that the Standard here might be applied to their industries, and were thus "alert[ed] . . . of the opportunity to submit comments as to the cover-

age of their industry," *ABC v. Brock*, AGC Pet. App. at 11a.

As petitioner AGC twice acknowledges, the adequacy of a rulemaking notice is a "factual issue." AGC Pet. at 14, 27. This Court does not sit to review such fact-intensive determinations. And in any event, the Third Circuit's determination is clearly correct. As we have set forth in detail in the Statement, *OSHA's notice of proposed rulemaking explicitly identified the scope of the Standard as an open issue to be resolved in the rulemaking, and explicitly invited comments on that issue. See supra* at 4. This was reiterated by OSHA's representative at the outset of the rulemaking hearing, *id.* at 5, and was not lost on other parties, who submitted evidence on this very issue, *id.*[14]

Nor is there any force to the contention that OSHA "violated the plain language of [its] governing statute" by not publishing a proposed rule under which the HCS would apply to non-manufacturing industries. ABC Pet. at 11. *See also* NGFA/UT Pet. at 23-25. Petitioners rely on § 6(b)(2) of the OSH Act, 29 U.S.C. § 655 (b)(2), which provides that to initiate rulemaking, "[t]he Secretary shall publish a proposed rule. . . ." OSHA, of course, *did* publish a proposed rule. To be sure, the rule as proposed did not cover non-manufacturing

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[14] ABC asserts that "OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector." ABC Pet. at 13, citing 47 Fed. Reg. 12101-02. But the cited passage itself makes clear that what ABC describes as OSHA's "position" was simply the Agency's *proposal*, which OSHA explicitly stated was subject to modification depending on the evidence received. *See supra* at 4.

As for petitioners' contention that "the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS," ABC Pet. at 12; *see also* NGFA/UT Pet. at 25 n.18, the Third Circuit correctly determined that "[t]he slight changes that were made in the standard were a logical outgrowth of the rulemaking record. . . ." AGC Pet. App. at 9a.

employers. But nothing in § 6(b)(2) suggests that a final rule must be identical to the proposed rule—either with respect to its scope or with respect to any other provision—and such a requirement "would lead to the absurdity that in rule-making . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

Thus, as ABC appears to acknowledge, the most that can be drawn from § 6(b)(2) is that a proposed rule "should be sufficiently descriptive of the '*subjects and issues involved*' so that interested parties may offer informed criticisms and comments." ABC Pet. at 11, quoting *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (emphasis added). OSHA's 1982 notice easily satisfied that test.[15]

2. **"Foreclosure":** AGC complains that the Third Circuit held that petitioners were " 'foreclosed' by *USWA I* and *II*" from litigating two questions: first, "that [petitioners] had received adequate notice in 1982 that the standard might eventually regulate them, and [second] that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record." AGC Pet. at 27.

In point of fact, as to both of these issues the Third Circuit, while stating that petitioners *should* be foreclosed from raising the matter, nevertheless proceeded to consider—and to reject on the merits—petitioners' contentions. *See* AGC Pet. App. at 11a ("The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry.

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[15] Thus, the decision below does not conflict with *Ethyl Corp.* or with the other cases cited in ABC's Petition at 13 and in NGFA/UT's Petition at 23-25.

Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected."); *id.* at 13a ("Assuming . . . that th[e] opinions [in *USWA I* and *USWA II*] were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different.") Thus, AGC was not "foreclosed" from having its contentions heard by the court below, and the question whether such "foreclosure" would have been proper is not presented.

AGC's argument is frivolous in any event. In *USWA I* and *II* AGC was in the situation that confronts any party potentially affected by a regulation when a provision of the regulation that the party supports is under review on the petition of a party which holds the opposite view. In any such case, the party that approves of the agency's decision has the choice either to intervene in support of the agency or to rely on the agency to defend its position in court. AGC argues for a third option, contending that a party that chooses to ignore such a review proceeding should retain a right to obtain "full judicial review of the standard later," AGC Pet. at 28. That contention is unsupported by any precedent, would result in a myriad of review proceedings involving the same issues, and —even worse—would leave the status of an OSHA standard in limbo until all such "later" proceedings were resolved.

3. **Significant Risk:** The Third Circuit held that in promulgating the HCS OSHA properly made a "significant risk finding [that] applied to all workers who would be exposed to hazardous chemicals." AGC Pet. App. at 12a-13a. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene case*) (OSH Act embodies a requirement that a standard must be directed at ameliorating a "significant risk"). AGC and NGFA/UT assail this determination, contending that a finding of significant risk requires "industry-specific showings." AGC Pet. at i, 16; NGFA/UT Pet.

at 27-28. ABC makes a similar contention, ABC Pet. at 15.[16]

There is nothing in the OSH Act or in the *Benzene* case to suggest that a finding of significant risk must be made on an industry-specific basis. Indeed, the concept of an "industry" plays no role in the scheme of the Act.[17] It is, moreover, simply not the case that every health or safety hazard varies so dramatically from one "industry" to another as to make it necessary to analyze each industry separately in order to determine whether a significant risk exists. Rather, as the Third Court correctly recognized, where OSHA properly concludes that the hazard involved (here, lack of information on the part of employees regarding the chemical hazards encountered on the job) is *common to all industries*, the logic of the

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[16] ABC couples its "significant risk" argument with additional contentions that we discuss *infra* at 19-20.

[17] The only reference to the term "industry" in the substantive provisions of the Act is in § 6(g), 29 U.S.C. § 655(g), which states that "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." Nothing in the Act requires findings specific to each "industry," any more than the Act requires findings specific to each "trade," "craft," "occupation," "business," "workplace," or "work environment."

What is more, the term "industry" is not defined in the Act, nor has it been defined by petitioners, and the concept is an elusive one. For example, in the Standard Industrial Classification system, establishments are grouped into nine "divisions," which are in turn broken into more than eighty "major groups," designated by two-digit SIC Codes. See 52 Fed. Reg. 31868 (1987). Those two-digit classifications are further subdivided into three-digit and four-digit codes. The construction "industry" comprises Division C, consisting of three "major groups" and innumerable subdivisions. *Id.* AGC does not explain whether a requirement of "industry-specificity" would apply at the level of the nine "divisions," the more than eighty "major groups," or the hundreds of three- and four-digit SIC Code groupings.

situation and of the OSH Act is that the Agency may make a significant risk determination of corresponding breadth. No case has held to the contrary.[18]

Petitioners also assert that circumstances in the construction industry are such that employees in that industry, unlike their counterparts in other industries, face no significant risk when the employees are denied the information regarding chemical hazards that is required by the HCS. *See* AGC Pet. at 17-18; ABC Pet. at 15. That substantial evidence question does not warrant review and was, in any event, correctly resolved below.

OSHA found that as of 1977 the chemical source illness incidence rate in the construction industry, as reported by the Bureau of Labor Statistics ("BLS"), was 1.7 per 1,000 workers, *see* 48 Fed. Reg. 53285 (1983); and, as OSHA recognized, the incidence rates reported by BLS are seriously understated, *id.* at 53284. Of the eight major industrial sectors, only agriculture and manufacturing had higher chemical source illness incidence rates than construction. *Id.* at 53285. What is more, witnesses intimately familiar with conditions in the construction industry testified to the need for the Standard in this industry. *See* evidence cited *supra* note 7. Thus petitioners' contentions misstate the record.

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[18] In the case upon which petitioners principally rely, *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980) (*see* AGC Pet. at 16-17; NGFA/UT Pet. at 27-28; ABC Pet. at 15), medical studies affirmatively demonstrated that American *cotton gin workers* "do not suffer any long term impairment" from cotton dust exposure, 630 F.2d at 408. In those circumstances the Fifth Circuit held that studies showing the existence of such chronic impairment in *other* aspects of cotton manufacturing could not support a conclusion that a significant risk existed in *ginning*. *Id.* at 409. The holding in the case did not extend beyond that fact-bound determination; and the court certainly did not assert that OSHA must always assess significant risk industry-by-industry, or SIC Code-by-SIC Code.

4. **Feasibility:** Petitioners contend (1) that OSHA and the Third Circuit were required to "undertake [] an industry-by-industry analysis of feasibility," AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29; and (2) that the Court of Appeals improperly shifted the burden of proof on the question of the feasibility of the HCS to petitioners, *see* ABC Pet. at 16; AGC Pet. at 19-20, NGFA/UT Pet. at 29. The first contention misstates the law and the second contention misstates the Third Circuit's holding.

A. The feasibility requirement of the OSH Act requires only that the obligations imposed by a standard must be "capable of being done." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981) (*"ATMI"*). In determining whether this test has been met, the Act does not require OSHA to support its findings with an industry-by-industry analysis, but rather with "substantial evidence," however derived. OSH Act § 6(f), 29 U.S.C. § 655(f).[19] Furthermore, the very cases petitioners cite recognize that OSHA cannot be expected "to prove [a] standard *certainly* feasible for *all* firms at *all* times in *all* jobs," *United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1270 (emphasis by the court), cited in ABC Pet. at 17, AGC Pet. at 20, and NGFA/UT Pet. at 29. Rather, OSHA need only establish a "presumption of feasibility," 647 F.2d at 1270, which "remains rebuttable," *id. See also ASARCO, Inc. v. OSHA*, 746 F.2d 483, 496, 498-99 (9th Cir. 1984).

Of course, in some cases the nature of a standard is such that the feasibility of compliance can be expected to vary dramatically from one context to another, and there is consequently a need to assess feasibility on a context-by-context basis. This is true, for example—and a presumption of feasibility must therefore be established separately as to each affected type of work—when a

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[19] See *supra* note 17 and text thereat.

standard requires the use of engineering controls and the controls that can be implemented in one industrial setting are entirely different from those that can be implemented in another. That was the situation in *Steelworkers v. Marshall* and in each of the cases cited by petitioners, *see* AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29. But petitioners overread those decisions just as they overread the "significant risk" cases discussed *supra* at 16 and n.18. The essence of the matter is that no decision holds that an industry-by-industry analysis is required in every case, without regard to the nature of the standard in question; and, as we have shown, nothing in the statute would support such a requirement.

In this case, the obligations imposed by the HCS on petitioners are very modest, and are of such a nature as to be well within the capabilities of any industry, *see supra* at 2-3. In these unique circumstances the Third Circuit was entirely justified in dismissing petitioners' claims of infeasibility with these words:

> When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. [*ABC v. Brock*, AGC Pet. App. at 14a.]

B. Nor did the Third Circuit improperly shift any evidentiary burden to petitioners with respect to the feasibility issue. Because, as discussed, there was ample basis for concluding that the modest obligations imposed by the HCS are feasible for all industries, the Third Circuit's holding that the Standard should apply to all industries except where OSHA "can state reasons why such application would not be feasible," *USWA I*, 763 F.2d at

739, AGC Pet. App. at 51a-52a, simply represents a proper application, in the factual context of this case, of the approach articulated in the very cases petitioners endorse. For those cases hold that OSHA need only make a finding of "*general* feasibility," *Steelworkers v. Marshall*, *supra*, 647 F.2d at 1272 (emphasis added); *ASARCO, Inc. v. OSHA*, *supra*, 746 F.2d at 498, while leaving open the possibility that the general finding may be rebutted by evidence of *infeasibility* in a particular setting. *See supra* at 17.

In any event, OSHA did not merely find an absence of evidence of *infeasibility*, but affirmatively found that compliance *is feasible* in all industries. *See* 52 Fed. Reg. 31855-57 (1987). Thus when all is said and done, petitioners' arguments reduce once again to a contention that OSHA and the Third Circuit gave less weight than petitioners would like to the allegedly unique circumstances of their industry. *See supra* at 16. OSHA however fully explained its rejection of petitioners' position, *see* 52 Fed. Reg. 31859 (1987), and this factual dispute presents no question worthy of this Court's review.

5. Reasonable Necessity: ABC and AGC raise a series of vaguely formulated—and, as we show, insubstantial—arguments based on § 3(8) of the Act, 29 U.S.C. § 652(8), which defines an "occupational safety and health standard" as a standard the requirements of which are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *See* ABC Pet. at 14-16; AGC Pet. at 21-23.

A. ABC relies on the portion of the *ATMI* case, 452 U.S. at 536-40, striking down an earnings-protection provision in the Cotton Dust Standard. *See* ABC Pet. at 14.[20] The infirmity the Court found in that provision was that:

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[20] The standard required employers to provide employees who were physically unable to wear a respirator the opportunity to

> OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." [452 U.S. at 538].

In other words, the Court held that OSHA may not promulgate a provision designed solely "to repair general unfairness to employees that is unrelated to achievement of health and safety goals." *Id.* at 540. The HCS contains no such provisions.[21]

B. The *ATMI* Court, while holding that § 3(8) cannot be construed to "countermand" the specific requirement of § 6(b)(5) that in promulgating standards for toxic materials OSHA must promulgate the most protective standard feasible, 452 U.S. at 513,[22] suggested that § 3(8) "might come into play as an additional restriction" if OSHA were to impose requirements in a standard that were entirely *redundant*, such that "the *same reduction* in health risk" would be achieved in the

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transfer to another position. The challenged portion of that provision required "the employer [to] guarantee that the employee [who transfers] suffers no loss of earnings or other employment rights or benefits." 452 U.S. at 537.

[21] As long as a provision promulgated by OSHA has a health-protective purpose and is consistent with the Agency's mandate to promulgate the most protective standard that is feasible, the provision need only satisfy the familiar test that regulatory action must be "reasonably related to the purposes of the enabling legislation." *Forging Industry Assn. v. Secretary of Labor*, 773 F.2d 1436, 1447 (4th Cir. 1985) (*en banc*), quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). *Accord, Steelworkers v. Marshall, supra*, 647 F.2d at 1237. There is no contention here that the HCS fails that test.

[22] *See also National Grain and Feed Ass'n v. OSHA*, slip op. at 5-7 (5th Cir. Jan. 24, 1989), *modifying opinion published at* 858 F.2d 1019 (1988); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988); *ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984).

absence of the superfluous requirements. 452 U.S. at 514 n.32 (emphasis added).[23] *Cf. ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984). AGC asserts that OSHA transgressed that *possible* limitation here and that this case is an "ideal vehicle" for settling the scope of § (8). AGC Pet. at 21. This case does not, however, raise any question as to § 3(8)'s scope.

All parties to these cases have proceeded on the assumption that if "the *same reduction* in health risk" (*ATMI, supra*) would occur in the absence of the Standard, the Standard would be invalid. Petitioners' contention that the HCS is subject to attack on this ground failed not because of any disagreement on the governing legal rule but because the contention is unsupportable on the facts.[24]

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[23] In the same footnote the Court left open the question "[whether] \§ 3(8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6(b)(5) of the Act." *Id.* at 513 n.32. Since the HCS was promulgated under § 6(b)(5) no such § 3(8) question is presented here. A related question is whether such balancing might be required or permitted in the case of standards dealing with *safety*, as distinguished from *health*; that is the issue with which "the Fifth Circuit has recently struggled," AGC Pet. at 22-23. *See National Grain and Feed Ass'n v. OSHA, supra.* Since the HCS is a *health* standard, *see* 48 Fed. Reg. 53320 (1983); *USWA I*, AGC Pet. App. at 40a-42a, the question presented in that case is not presented here.

[24] Thus, ABC contends that there is no need for the HCS in construction because construction contractors are already subject to a training requirement. ABC Pet. at 15, citing 29 C.F.R. § 1926.21. This argument is patently lacking in merit. OSHA properly determined that effective hazard communication requires three components, and that "[n]o one of these three components alone—labels, material safety data sheets, or training—can be demonstrated to be completely effective in communicating hazards." 48 Fed. Reg. 53311 (1983). *See also* 52 Fed. Reg. 31858-59 (1987) (discussing the need for MSDSs in the construction industry in order to make training programs effective). The Third Circuit was therefore correct in concluding that the provisions of the HCS which "require[] . . . maintenance on the jobsite of information on

6. Setting Rulemaking Priorities: AGC asserts that in *USWA I* and *USWA II* the Third Circuit intruded on the administrative province by interfering with OSHA's setting of rulemaking priorities. AGC Pet. at 24-26.

As a threshold matter AGC did not advance this contention below, and therefore cannot do so now.[25] It can moreover easily be shown that AGC's contention is unfounded and, out of caution, we make that showing now.

Unlike cases where parties seek to compel OSHA to undertake a rulemaking the Agency does not wish to undertake, or to expedite a rulemaking the Agency does not wish to expedite (see cases cited in AGC Pet. at 26), *USWA I* involved a challenge to OSHA's resolution of an issue that was squarely presented and resolved in a *completed* rulemaking that OSHA undertook of its own accord. In *USWA I* no party was seeking to dictate how OSHA's rulemaking resources should be allocated; the

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[chemical] risks can only make the existing training more effective." *AGC v. Brock*, AGC Pet. App. at 13a.

AGC complains about the requirement that MSDSs must be "physically present on every construction jobsite," AGC Pet. at 22; but as OSHA determined, this is needed so that "[e]mployees will . . . be able to access the information as required." 52 Fed. Reg. 31865 (1987) (discussing written hazard communication programs). *See also id.* at 31866 (discussing MSDSs).

And, AGC's contention that the HCS requires employers to provide "redundant hazard training to experienced construction tradesmen each time they move from job to job," AGC Pet. at 22, grossly exaggerates the actual requirements of the HCS in this regard—requirements that are "performance-oriented" and flexible. 52 Fed. Reg. 31866 (1987), 48 Fed. Reg. 53311-12 (1983).

[25] AGC's briefs to the Third Circuit did not even cite the provision of the OSH Act, § 6(g), 29 U.S.C. § 655(g), upon which AGC now seeks to base its argument. What is more, the case in which AGC has sought certiorari, *ABC v. Brock*, is, by AGC's own account, "not 'the same case' " as *USWA I* and *II*. *See* AGC's Reply Brief in *ABC v. Brock* at 7. Accordingly, AGC cannot, by petitioning for certiorari in *ABC v. Brock*, bring before this Court the rulings in *USWA I* and *II*.

only question presented was whether a standard actually issued by the Agency satisfied the requirements of § 6(b)(5). *See supra* at 7-8. As the Third Circuit recognized, OSHA's authority to set rulemaking priorities, embodied in § 6(g) of the Act, 29 U.S.C. § 655(g), does not shield the Agency from being called to account when a standard promulgated by the Agency for toxic substances provides less protection than § 6(b)(5) mandates, whether the failure is in not providing proper protection to covered employees or in not properly covering employees. *USWA I*, AGC Pet. App. at 40a, *citing United Steelworkers of America v. Marshall*, *supra*, 647 F.2d at 1309-10. *See also Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1270-72 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). The decisions are uniform on this point.[26]

The decision in *USWA II*, which required OSHA to complete the reconsideration required by *USWA I* without the unnecessary delay that would be occasioned by another round of notice-and-comment, represented, in turn, a straightforward application of the Third Circuit's express statutory authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), bolstered by that court's authority to enforce its judgment in *USWA I* by issuing "all writs necessary or appropriate in aid of" its jurisdiction, 28 U.S.C.

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[26] The Third Circuit's reliance on the D.C. Circuit's decision in *Steelworkers v. Marshall* is answer enough to AGC's contention that the Third Circuit's resolution of this issue "squarely conflict[s] with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting." AGC Pet. at 26.

In *Steelworkers v. Marshall* the D.C. Circuit made it clear that a decision to exclude an industry from a standard, made after a rulemaking in which that point was at issue, is subject to full judicial review and must be shown to comport with the record evidence and the statutory mandate. *See* 647 F.2d at 1309-10.

§ 165(a). *See USWA II*, AGC Pet. App. at 68a. AGC's assertion that the court below was simply seeking to impose on OSHA its "own notion of which procedures are 'best,'" AGC Pet. at 24, quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is empty rhetoric that has no basis in the Third Circuit's order.

7. Delegation to a Private Party: NGFA contends that OSHA "delegat[ed] . . . its rulemaking authority to a private entity," NGFA/UT Pet. at i, 9, by adopting the Threshold Limit Values list of the American Conference of Governmental Industrial Hygienists (ACGIH), as one of the base lists of hazardous substances covered by the HCS; and NGFA argues that this "delegation" violated both the OSH Act, NFGA/UT Pet. at 10-19, and the Constitution, *id.* at 19-22. This contention is not worthy of further review on two independent grounds.

A. The "delegation" issue is of no present practical moment by reason of a recent rulemaking action by OSHA. NGFA has attacked OSHA's alleged delegation of authority only with regard to the inclusion of *grain dust* as a hazardous substance.[27] As a result of a new standard for Air Contaminants published by OSHA on January 19, 1989 (amending 29 C.F.R. Part 1910, Subpart Z), *grain dust is now covered by the HCS under the provision that covers all substances included in the Air Contaminants Standard* as well as under the provision providing coverage by reason of the ACGIH listing. *See* 29 C.F.R. § 1910.1200(d)(3), discussed *supra* at 2-3. OSHA took the step of adding grain dust to the Air Contaminants Standard after reviewing the "substantial amount of information . . . submitted to the record [of

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[27] This was the extent of NGFA's challenge case in the court below as well as in this Court. Indeed, NGFA would lack standing to challenge the HCS as the Standard applies to anything other than grain dust.

the Air Contaminants rulemaking] addressing the health evidence [with respect to grain dust]," and determining "that an exposure limit for grain dust is necessary to reduce the significant risk of adverse respiratory effects associated with exposure to this material." 54 Fed. Reg. 2510 (Jan. 19, 1989).

Against this background, a ruling in NGFA's favor on its "delegation" claim would have no effect on NGFA's hazard communication obligations.[28] Thus the "delegation" question is only of academic interest in this case.

B. Turning to the merits, NGFA seeks to extend the delegation concept to new lengths by arguing that OSHA "delegated its rulemaking authority" to a private entity by adopting that entity's scientific determination that certain substances are hazardous. The Government relies on the determinations of private scientists from Newton on down every day. And NFGA does not cite a single case in which this Court or any other has struck down, on statutory or constitutional grounds, *any* regulation as an unlawful delegation of authority to a private entity, much less a regulation involving the kind of normal and benign reliance on private scientific learning involved here.[29]

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[28] Even without the recent amendment to Subpart Z, it is far from clear that NGFA would have standing to attack the use of the ACGIH list. As NGFA has acknowledged, grain dust is covered under the HCS as a *physical* hazard, due to its combustibility. *See* Exh. 2-97, OSHA Docket H-0221 (NGFA requests exemption for grain dust on the ground that its combustibility is "unmistakable"). *See also ABC v. Brock*, AGC Pet. at 13a ("As to the risks posed by grain dust, the propensity of grain elevators to blow up has been well documented"). Grain dust would therefore be covered by the HCS as a *physical* hazard even if the dust were not listed as a *health* hazard by ACGIH or OSHA. *See* 29 C.F.R. § 1910.1200(c), 52 Fed. Reg. 31879 (1987) (defining "hazardous chemical" as "any chemical which is a physical hazard or a health hazard").

[29] Insofar as the statutory question NGFA seeks to raise is concerned, the most that can be said of § 6(a), 29 U.S.C. § 655(a),

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

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and of its legislative history, discussed at length in NGFA Pet. at 14-17, is that OSHA is not *compelled*, and perhaps not permitted, to adopt ACGIH *standards* without engaging in *§ 6(b) rulemaking*. Here, as noted, OSHA did not adopt any ACGIH *standard*. Rather, *after a § 6(b) rulemaking*, OSHA simply determined that certain scientific determinations by ACGIH should be adopted as one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by OSHA*.

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No. 88-1385

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., AND UNITED TECHNOLOGIES CORPORATION,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONERS, THE NATIONAL GRAIN & FEED ASSOCIATION, INC. AND UNITED TECHNOLOGIES CORPORATION

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REPLY BRIEF OF PETITIONERS, THE NATIONAL GRAIN & FEED ASSOCIATION, INC. AND UNITED TECHNOLOGIES CORPORATION

Petitioners, The National Grain & Feed Association, Inc. ("NGFA") and United Technologies Corporation ("UTC"), submit this brief in reply to the briefs of Respondents, the Occupational Safety and Health Administration ("OSHA") and United Steelworkers of America, AFL-CIO, CLC and Building and Construction Trades Department, AFL-CIO ("Union Respondents"), in opposition to Petitioners' Petition for a Writ of Certiorari in No. 88-1385.

I. THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION VIOLATED THE OCCUPATIONAL SAFETY AND HEALTH ACT AND ARTICLE I OF THE UNITED STATES CONSTITUTION BY IMPROPERLY DELEGATING ITS RULEMAKING AUTHORITY TO THE AMERICAN CONFERENCE OF GOVERNMENTAL INDUSTRIAL HYGIENISTS, INC.

Respondents attempt to minimize the need for this Court's review of OSHA's improper delegation of authority to the American Conference of Governmental Industrial Hygienists, Inc. ("ACGIH") by minimizing both the importance of this method of hazard determination and the effect that the delegation has on Petitioners. This attempt, however, is unpersuasive.

The delegation of rulemaking authority to ACGIH is neither a minor nor an innocuous part of the overall regulatory scheme. It is neither simply "a source of public information in the hazard determination process," OSHA Opposition at 25 n.19, nor is it merely "one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by* OSHA." Union Respondents Opposition at 26 n.29. Therefore, Respondents' contention that Petitioners' Petition for a Writ of Certiorari should be denied because of the minor and

technical nature of the RHCS' adoption of the TLV Table is overly simplistic and simply wrong.

The determinations made by ACGIH directly correlate to those substances to be included in the TLV Table, and thus, the substances to be regulated by OSHA. Without doubt, the determination as to what substances are to be regulated by the RHCS is significant. Far from minor "matters of a more or less technical nature," OSHA Opposition at 25, such determinations represent the most basic and fundamental policy choices embodied in the Standard, and yet they are being made by a private organization.

Respondents do not deny that OSHA's delegation of its authority to ACGIH is final and complete. OSHA provides neither procedural safeguards nor technical standards to guide ACGIH's evaluation of chemicals for inclusion in its TLV Table. OSHA adopts ACGIH's determinations automatically and without Agency review.[1] Such delegation is all the more startling in light of OSHA's admission that ACGIH is not bound by the same procedural and substantive limitations that constrain the Agency in making its regulatory determinations, *e.g.*, opportunity for notice and comment, required findings of significant risk and economic and technological feasibility. *See* OSHA Opposition at 26 n.19.

In addition, Respondents simply ignore the fact that OSHA has not only adopted a private organization's conclusions without review, the Agency has delegated its authority to determine the scope of the RHCS to ACGIH

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[1] For this reason, Respondents cannot and do not deny that the rulemaking record is completely devoid of any material supporting ACGIH's determinations. As noted by Petitioners, neither the ACGIH TLV Table nor any supporting documentation was placed in the record. Pet. at 13 n.10. Thus, despite OSHA's protestations that ACGIH's inclusion of oat, wheat and barley dust on its TLV Table was based on 36 scientific studies and reports, OSHA Opposition at 22-23 n.14, no evidence of this exists in the rulemaking record, and clearly no evaluation of the reports' findings and methods was undertaken.

in perpetuity. When ACGIH establishes in the future a TLV for any substance, the substance will *automatically*, with no consideration by OSHA, become subject to the RHCS. There exists no procedure whatsoever by which OSHA will evaluate or review those changes. In fact, OSHA does not even have a mechanism by which it will receive notice of such changes.

The designation of grain dust as a hazardous chemical for the purposes of the RHCS highlights the power given by OSHA to ACGIH. In 1986, when ACGIH established a TLV for grain dust, grain dust automatically became subject to the RHCS.[2] This was far from being just a minor technical modification to the Standard. The action created new obligations for newly regulated entities, all without consideration or participation by OSHA or affected industries.

OSHA seeks to justify its violation of procedural safeguards by attesting to the alleged reputation and impartiality of ACGIH. OSHA Opposition at 22 n.13. Even if this attestation were accurate, which NGFA disputes, *see infra* at 5 n.3, such testimonials are of no relevance. The OSH Act prohibits OSHA from delegating its rulemaking authority to a private organization, regardless of the organization's reputation. OSHA at the very least was obligated to review and endorse the determinations of ACGIH. The Agency's failure to perform such a review is hardly remedied by a recitation of ACGIH's alleged impartiality.

OSHA does not refute Petitioners' assertion that ACGIH is not bound by the same procedural and substantive limitations that constrain the Agency. Instead, OSHA curiously attempts to analogize ACGIH's determination process to that used by chemical manufacturers and scientists upon whose studies such manufacturers must rely pursuant to 29 C.F.R. § 1910.1200(d)(2).

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[2] However, grain elevators were not regulated at that time because they are not manufacturers under Standard Industrial Classification ("SIC") Codes 20-39.

OSHA Opposition at 26 n.19. This analogy, however, is unpersuasive. Unlike determinations made by chemical manufacturers and scientists, whose findings and studies can be challenged by employers who are cited for violations under the RHCS, determinations of ACGIH are conclusive and cannot be challenged. For this reason, the absence in ACGIH's determinations of the procedural and substantive safeguards that Congress imposed on OSHA is fatal.

OSHA casually discounts Petitioners' constitutional arguments by contending that the delegation to ACGIH is permissible because government agencies may seek the assistance of private parties in " 'matters of a more or less technical nature.' " OSHA Opposition at 25 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)). However, this argument simply proves too much. Virtually every matter before OSHA is of a "technical nature," but notwithstanding its reliance on scientists "from Newton on down," Union Respondents Opposition at 25, the Agency could not, as a consequence, simply delegate all its rulemaking authority to private experts in various fields. It is the Agency itself which must provide the technical and scientific knowledge which Congress sought through its delegation of regulatory authority to OSHA. "Where Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority." *See Population Institute v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986). Thus, the mere presence of technical issues in a proposed rulemaking is not a license for OSHA to completely remove itself from the actual decisionmaking process, as it has done with its delegation of authority to ACGIH.[3]

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[3] OSHA further attempts to support the constitutionality of its improper delegation of authority to ACGIH by analogizing such a delegation to OSHA's authorization in Section 6(a) of the OSH Act to adopt, without rulemaking, national consensus standards. OSHA Opposition at 25 n.18. However, such an analogy strains all logic and common sense. Section 6(a) authorized only the incorporation

OSHA's attempt to defend its improper delegation of authority to ACGIH on the ground that the Agency is not required to determine whether individual substances are hazardous for purposes of the RHCS is equally unavailing. OSHA Opposition at 20-21. As this Court has made clear, the Act requires a showing that a regulated substance represents a significant risk to employees. *See Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 653-64 (1980) (Plurality).[4] Common sense

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of a specific set of consensus standards, and not the wholesale adoption, in perpetuity, of the most recent findings of a particular private organization which concededly does not act by consensus. The latter situation, which exists in the instant case and permits the private entity to modify unilaterally Agency standards well into the future, is a far different category of delegation and one by which the Agency "crossed the line that demarcates constitutional delegations of rulemaking authority." OSHA Opposition at 24-25.

The difference between Section 6(a) national consensus standards and proprietary standards such as those adopted by ACGIH also discredits OSHA's contention. As the Agency admits, delegations of authority to private organizations are constitutionally deficient if the delegatee could exercise its authority "in a biased or self-aggrandizing manner." OSHA Opposition at 25. Thus, the importance of procedural fairness in a delegatee's exercise of its authority is of unquestioned relevance in determining the constitutionality of the delegation itself. The authority to adopt non-governmental standards without rulemaking pursuant to Section 6(a) was specifically tailored by Congress to apply to national consensus standards as opposed to proprietary standards for the very reason that the former standards satisfied the procedural fairness concerns of Congress. Pet. at 15-17. Thus, the decisions establishing the constitutionality of the adoption of standards under Section 6(a), which, by definition, are promulgated according to strict procedural requirements, are simply inapposite to the situation in the instant case. It is interesting to note that OSHA acknowledges that not only is ACGIH not bound by the same procedural requirements as is the Agency, OSHA Opposition at 26 n.19, its membership requirements effectively exclude industry representatives. OSHA Opposition at 22 n.13.

[4] OSHA cites this case for the proposition that the significant risk requirement is lessened when certain "information-gathering" requirements are involved, in an apparent attempt to provide support for the lower court's novel theory that the requirements of the

dictates that if a substance is not actually hazardous, then its treatment as hazardous by the RHCS will not reduce a significant risk in the workplace as required by the Act. For this reason, the RHCS contains an elaborate scheme for determining which substances are hazardous for purposes of the RHCS. OSHA Opposition at 21-24. Thus, the RHCS itself acknowledges the necessity of establishing a significant risk to employees as a result of exposure to substances that are covered by the RHCS. OSHA's claim, therefore, that it is not necessary to establish that individual substances represent a significant risk to employee health is contrary to the holding of this Court, common sense, and the RHCS itself.

The implicit basis for the Agency's position is that while hazard determinations are a crucial element of the RHCS, OSHA lacks the staff to make significant risk determinations for individual substances. OSHA Opposition at 14. Such a problem cannot, of course, excuse non-compliance with the statutory and constitutional parameters under which OSHA must operate. In any event, Petitioners do not contest the Agency's decision to put a " 'floor' under the hazard determination process." OSHA Opposition at 22. Rather, Petitioners challenge OSHA's decision to allow a private organization to determine that floor with no Agency oversight or review.[5] That OSHA

Act are not applicable to performance-oriented informational disclosure standards. OSHA Opposition at 15. However, the portion of the decision cited to refers only to medical testing of employees and has nothing to do with whether a specific substance represents a significant risk to employee health, a question at the core of the effectiveness of the RHCS. *See Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 658 & n.66 (1980) (Plurality).

[5] Thus, the legislative directives recited by OSHA in its Opposition at 24 n.16, while laudable, are not relevant to the current inquiry. At issue are not the ends which the Agency strives to achieve, but rather the means which are employed to obtain such results. The Agency, both in delegating its authority to ACGIH and in responding to Petitioners' Petition for a Writ of Certiorari has ignored the statutory and constitutional parameters of its authority. Further, OSHA fails to show how compliance with these

has the resources to conduct such a review has recently been demonstrated in the new Standard for Air Contaminants published by the Agency on January 19, 1989, 54 Fed. Reg. 2329-2984 in which OSHA reviewed all the substances on the ACGIH TLV Table to determine whether each represented a significant risk to employee health.[6]

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parameters would prevent it from achieving the goals set forth in the Act.

[6] The Union Respondents argue that this new OSHA rule, in effect, moots the Petition for a Writ of Certiorari as to the delegation issue. Union Respondents Opposition at 24. This, however, is not the case. The rule on Air Contaminants is itself being challenged by well over 15 petitioners from numerous industries and may not withstand scrutiny. Moreover, other dusts not included in this new rule, such as soybean or corn dust, could in the future be added to the ACGIH TLV Table and become part of the RHCS. Furthermore, removal of dusts from Subpart Z will not affect the hazard determination process under the RHCS, as those substances will still remain on the ACGIH TLV Table.

Respondents also argue that oat, wheat and barley dust are physical hazards pursuant to 29 C.F.R. § 1910.1200(c), and are, therefore, covered by the RHCS regardless of whether the dusts are listed as a health hazard by ACGIH. Union Respondents Opposition at 25 n.28. However, even if this were correct (and the fact that the RHCS is a health rather than a safety standard belies this conclusion), Respondents ignore the fact that inclusion of these dusts in the RHCS as health hazards increases grain elevator operators' communication obligations. *See, e.g.*, 29 C.F.R. § 1200(g)(2)(vi) (inclusion of ACGIH TLV on the material safety data sheet as well as other information regarding alleged health effects); 29 C.F.R. § 1200(h)(1) (provision of information to employees regarding alleged health effects); 29 C.F.R. § 1200(h)(2) (provision of employee training regarding alleged health effects). Thus, incorporation into the RHCS of the ACGIH TLV Table as regards oat, wheat and barley dust has a significant impact on the obligations of grain elevator operators.

In addition, OSHA argues that regardless of the inclusion of oat, wheat and barley dust on the ACGIH TLV Table, the dusts would be covered under the RHCS because ACGIH's determination was based on 36 studies. OSHA apparently assumes, with no support, that these studies meet the requirements of the RHCS. It is not surprising that the Agency fails to identify the portion of the record which supports its conclusion since OSHA did not include either an ACGIH TLV Table or supporting studies in the record. Moreover, NGFA strongly disputes that these studies, which were

II. PETITIONERS WERE DEPRIVED OF THEIR STATUTORY RIGHT TO BE HEARD CONCERNING THE CONTENT OF THE REVISED HAZARD COMMUNICATION STANDARD.

As the Union Respondents make plain, the rulemaking at issue herein was completed by the time *USWA I* issued from the Court of Appeals. Union Respondents Opposition at 22. The RHCS is a significantly different and more expansive OSHA Standard from that which existed at the time *USWA I* issued. Not only did OSHA enlarge the scope of the Standard to include industries outside the manufacturing sector, but, as OSHA admitted, it substantively amended the Standard, purportedly to make it meaningful and in conformance with the particular needs of these additional industries.

The Court of Appeals characterized these changes in its *USWA III* decision as "logical outgrowth[s] of the rulemaking record." OSHA Opposition at 9 n.4. As OSHA makes clear to this Court and made clear to the Court of Appeals, the factual basis for the revised Standard was not extant in the original rulemaking record. Rather, OSHA began accumulating evidence subsequent to *USWA I*. This evidence was never submitted to rulemaking and, accordingly, Petitioners never had the opportunity to comment on this evidence. Moreover, Petitioners were deprived of the opportunity to comment on the admittedly substantive revisions which OSHA made to the Standard.[7]

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essentially devoted to wheat dust and the great majority of which have no relevance, would satisfy the requirements of the RHCS for determining whether a substance is hazardous. Obviously, this Court is not in a position to make such a determination. The proper forum to determine the issue would have been the OSHA rulemaking for the RHCS, but the Agency adopted the ACGIH TLV Table without reviewing the validity of ACGIH's conclusions.

[7] OSHA's attempt to minimize the importance of the substantive amendments by characterizing those changes as logical outgrowths of the original proceeding is also inconsistent with the position taken in its Petition for Certiorari of *USWA III*. Petitioners agree that the issues presented by that Petition are im-

Additionally, OSHA summarily dismisses other important consequences which the revised Standard will inflict on the public as if those consequences are of no moment. The original rulemaking, which the Union Respondents rightly characterize as completed by *USWA I*, did not include employers outside the manufacturing sector within the definition of those persons who bear the more weighty responsibilities under the Standard. As Respondents point out, those responsibilities include preparing material safety data sheets and labels, as well as overseeing the distribution of these materials to downstream consumers. OSHA goes so far as to suggest that NGFA could have anticipated that the Court of Appeals would expand the definition of chemical manufacturers to include persons not engaged in manufacturing and, therefore, that NGFA was aggrieved when the Standard was issued in its original form.[8]

Revisions to the Standard, such as the amended definition of "manufacturer," were not available for public debate. Respondents' arguments operate to deny the public its statutory and constitutional right to comment on substantive rules of conduct.[9]

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portant and that the Writ of Certiorari ought to issue. The information gathering requirements in the revised Standard for multi-employer worksites was of sufficient substance that the Director of the Office of Management and Budget ("OMB") saw fit to order OSHA not to implement the requirement. That provision appeared only in the revised Standard; there was no evidence in the original record to support the requirement.

[8] The fallacy of the argument is that grain and feed warehouses are not chemical manufacturers and were not chemical manufacturers when *USWA I* was decided by the Court of Appeals. They became "manufacturers" for purposes of the revised Standard when ACGIH included grain dusts on its TLV Table in 1986, and when OSHA expanded the definition of "manufacturer" in the amendments made to the Standard in 1987. There was no opportunity, nor any cause to suppose, that these widely disparate actions should have been anticipated by NGFA in 1983 when the litigation over the original Standard was instituted.

[9] The Union Respondents argue that the Court of Appeals correctly held that the existing record was adequate to make the

CONCLUSION

Accordingly, Petitioners' Petition for a Writ of Certiorari should be granted.

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feasibility determination and precluded any further fact-gathering. That the Court of Appeals truncated OSHA's statutory obligation to allow public comment, apparently, does not disturb these Respondents. This position strains logic in light of the Union Respondents' argument regarding the Paperwork Reduction Act ("PRA") in which it suggests that:

> if the statement in OMB's decision disapproving the three provisions at issue here had been submitted as comments on a proposed rule, and if OSHA had rejected OMB's suggestions . . . OSHA's position could not be characterized as "unreasonable," and OMB would have had no right under the PRA to disapprove OSHA's decision.

Union Respondents Opposition in Nos. 88-1075 and 88-1434 at 12. Ironically, however, these comments were precluded by the Court of Appeals.

Another interpretation of the events giving rise to this dispute is, as the briefs in opposition of the Union Respondents and Public Citizen in Nos. 88-1075 and 88-1434 suggest, that OSHA took advantage of the order issued in *USWA II* to avoid its responsibilities under the rulemaking provisions of the Act and to frustrate the responsibilities of OMB under the PRA. The Court of Appeals in that decision gave OSHA 90 days to apply the 1983 Standard to non-manufacturers. The Agency used this time to create substantive amendments to the Standard and denied the public and OMB any opportunity to comment. Thus, OSHA created the paperwork compilation requirements which were the subject of the OMB order.

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Nos. 88-1070, 88-1075, 88-1385 and 88-1434

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OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

[Captions Continued on Inside Cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1385

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is associated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Most of the NAM member companies are heavily regulated in many areas of their activities, at substantial expense to the member companies and to the consumers of their manufactured products. A significant portion of the expense is associated with a broad array of federal requirements to create, disseminate and keep records. Most of the regulation and recordkeeping requirements are not directly imposed on NAM members by statute; they are imposed principally by agency rules.

The members of NAM have been covered by a Hazard Communication Standard ("HCS") since 1983, and are not directly affected by the adoption of an HCS for non-manufacturers. However, the members of NAM are vitally affected by the Third Circuit's decisions undermining the procedural safeguards contained in the requirements of the Administrative Procedure Act ("APA") and the Occupational Safety and Health Act ("OSH Act") that agency rules only be adopted after notice and opportunity to comment. Likewise, NAM's members are adversely affected by the Third Circuit's restrictive interpretation of the Paperwork Reduction Act of 1980, a law which has benefited the productivity of American manufacturers by ameliorating the burdens of federally sponsored paperwork.

NAM therefore submits this brief as *amicus curiae*, with the consent of all parties, in support of the Petitions for Writs of Certiorari in order to assist the Court in evaluating the importance of the issues presented.

PRELIMINARY STATEMENT

These cases bring before the Court two major issues affecting the functioning of all federal administrative agencies. The first issue is whether the notice and opportunity to comment on a proposed HCS for manufacturers was sufficient under the APA and the OSH Act for the adoption of a final HCS for non-manufacturers. The second issue is the scope of the authority of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1980 to reduce paperwork requirements imposed by the Occupational Health and Safety Administration ("OSHA"). Petitioners seeks writs of certiorari in connection with two cases decided by the Third Circuit. *Associated Builders and Contractors, Inc. v. Brook*, No. 88-1075 (3d Cir., Nov. 25, 1988) (a consolidation of four petitions for review of administrative action), and *United Steelworkers of Am. v. Pendergrass* (USWA III), 855 F.2d 108 (3d Cir. 1988).

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS REDUCED THE MINIMUM PROCEDURAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT BELOW THE PARAMETERS ESTABLISHED BY CONGRESS AND THE SUPREME COURT. THIS REDUCTION WORKS A SUBSTANTIAL HARDSHIP ON INDIVIDUALS AND ORGANIZATIONS THAT PARTICIPATE IN REGULATORY MATTERS AND DIMINISHES THE QUALITY OF RULEMAKING.

The United States Court of Appeals for the Third Circuit violated the APA and the OSH Act in adopting an HCS for non-manufacturers without permitting OSHA to provide non-manufacturers with notice and an opportunity for comment beyond that afforded by the original notice applying an HCS to manufacturers in 1982. 42 Fed. Reg. 12,092 (1982). Insofar as that court's action is seen as allowing rulemaking without notice and comment, the decision is a novel departure from settled law [1], is at odds with other Circuits [2], works a substantial hardship on individuals and organizations who participate in regulatory matters, disserves the government agency seeking the views of the affected public, and is deserving of reversal by this Court.

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[1] *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (OSHA must show each specific provision of safety standard contributed to increased safety); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 667 (1980) (plurality invalidated OSHA's benzene standard because of failure to explain how rule would benefit workers).

[2] *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

A. This Court Should Resolve The Question of What Degree of Change Between Proposed and Final Rulemakings Triggers a Requirement For a New Proposal.

Both the APA and the OSH Act require OSHA to provide notice and opportunity for comment on proposed regulations before they become final. 5 U.S.C. § 553(b) (1982) and 29 U.S.C. § 655(b) (1982). Under order of the Third Circuit, OSHA published no proposed regulations on the application of an HCS to the non-manufacturer employers.

The Third Circuit justified its order prohibiting further notice by relying on its earlier decision in *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) and similar decisions in the United States Court of Appeals for the District of Columbia. *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). Those lower court decisions established that a final rule may differ from the proposed rule where the change is a "logical outgrowth" of the rulemaking proceeding. 647 F.2d at 1221; *NRDC v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (stating that substantial changes can be made "as long as the final changes are in 'character with the original scheme' and 'a logical outgrowth' of the notice and comment.")

The proper scope of this "logical outgrowth" concept is

> an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U.S.C. § 553, or similar provisions in new Acts of Congress for review of agency action.

Eli Lilly & Co. v. Costle, 444 U.S. 1096, 1096 (1980) (Rehnquist, J. dissenting on denial of petition for writ of certiorari). Chief Justice Rehnquist's statement is

prophetic: the issue has continued to grow in importance, lacking needed guidance from the Supreme Court. The Court should review this case to resolve the critical question of how much change in a proposed rule is permissible without a reproposal begore final promulgation.

The application of a standard to an entirely new group of industries cannot be deemed a "logical outgrowth" of a proposed rule which did not previously affect those industries. The impacts of an HCS on the construction and agricultural communities differ significantly from the impacts on the manufacturing community initially covered.[3] In addition to qualitative differences between the affected communities, the quantitative change effected by extending the HCS from manufacturers to non-manufacturers eliminates any logic in the growth of the standard without additional notice and opportunity to comment.[4]

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[3] The 230% average turnover rate in the construction industry and the outdoor nature of construction work contrast with the "prototypical manufacturing workplace, which is generally a stationary worksite with a relatively stable workforce." Comments of the Associated General Contractors of America, Oct. 23, 1987, attached as Appendix 5 to the Petition for Review of a Final Rule of the Occupational Safety and Health Administration, *Associated Gen. Contractors v. OSHA* (3d Cir.) (No. 88-1070), at 13a.

[4] The August 24, 1987 expanded rule applied an HCS, without notice and opportunity to comment other than that afforded in 1982, to 4,503,879 theretofore uncovered establishments with a total employment of 58,890,236, of which an estimated 18,391,096 employees are exposed in the workplace to hazardous chemicals. 52 Fed. Reg. 31,852, 31,871. OSHA estimated the cost of the application to non-manufacturing employers to be $687.2 million in the first year, with substantial additional costs each year thereafter. *Id.* at 31,873. Indeed, without the benefit of a notice of proposed rulemaking, OSHA may have seriously underestimated both coverage and cost impact of its new rule. For example, the Association of General Contractors testified before OMB that compliance in the construction industry would require 58 million man hours in the first year with costs for retraining at 38 million man hours for subsequent years. In contrast, OSHA estimated the costs at 34 million and 8 million respectively for all industries.

The final rulemaking extending the HCS to non-manufacturers is not a logical outgrowth of the initial standard and should have triggered a new proposal to allow comment since the non-manufacturers did not have "a fair opportunity to present their views on the contents of the final plan." 824 F.2d at 1283. The error of the Third Circuit in bypassing the APA and OSH Act notice and comment requirements for the entire non-manufacturing sector of the nation's industry provides an important opportunity for the Supreme Court to clarify the standards for re-proposal of proposed regulations.

B. The Practical Inability of the Public to Follow the Enormous Range of Rulemaking Activities Which May Potentially, But Not Expressly, Affect Them Makes a Clear Standard For Notice and Comment Imperative.

In addition to the unfairness to the non-manufacturers here, the practical consequences of the Third Circuit's decision for all future rulemakings are worrisome. "Agencies could in the future publish vague, ambiguous notices in the Federal Register, adverting obliquely to certain issues or proceedings, and then, months or years later, promulgate final rules and claim that constructive notice had been given." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978).

In each of the past five years, more than 3,000 proposed rules and 4,500 final rules have appeared in the Federal Register. Office of Management and Budget, Executive Office of the President, *Regulatory Programs of the United States Government, April 1, 1987 to March 31, 1988* 636.

Given this large number of federal rulemakings, those who are regulated and their associations, such as NAM, must limit the proposed rules that receive close attention.

When an agency announces, as OSHA did here,[5] that it will not adopt a standard for a class of the regulated community, members of that class typically pass on to other issues. Under the Third Circuit's rule, those excluded from regulation will nevertheless have to participate in rulemakings in which there is any shadow of an implication in the preamble that they might be included. This will lead to added expense and complexity for private and government parties.

The result for the courts is also worrisome. When an agency promulgates a final rule that excludes a sector of the regulated community and a review petition is filed, the seemingly excluded persons will have no choice but to intervene in the litigation to protect their interests. This will lead to unnecessary court interventions and will make such cases even more complex and burdensome.

Furthermore, the appropriateness, clarity, and efficacy of regulations which have not had the benefit of comments from all those potentially affected will be significantly diminished. "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). OSHA itself recognized the need for notice and comment so that the final regulation could accurately reflect the differences amnong the groups covered. OSHA stated that the HCS as developed "focused on existing practices and desirable implementation methods in manufacturing industries," and urged the Third Circuit to permit reproposing the regulations before applying them to non-manufacturers. Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Secretary of Labor (No. 83-3554) at 9. The need for a reproposal is evident from the record before OMB. Confusion over issues of coverage, scope and practicality raised by participants at the OMB hearings easily could

[5] 47 Fed. Reg. 12,092, 12,101-12,102 (1982).

have been addressed and clarified through a rulemaking proposal.[6] The Third Circuit decision deprived the agency of the opportunity "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule . . . ." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

C. The Third Circuit Could Have Instead Imposed Detailed Time Deadlines on OSHA.

Whatever the frustrations of the labor organization petitioners with the pace of achieving their goal, the Third Circuit should not have meddled in agency procedure to speed up agency action.[7] The court could have imposed a reasonable time limit instead. The ability of courts to fashion remedies that achieve results without interfering with the agency's attempt to assure adequate notice and comment is amply demonstrated by the remand issued in *EDF v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (ordering EPA to adhere to a schedule for fulfilling its statutory obligations).

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[6] For example, The National Druggist Association raised legitimate questions as to whether capsules which contain powders or liquids were exempt from the rule noting that if they were not, an additional $3,400,320 in compliance costs would be incurred by druggists. October 16, 1987 hearing before OMB at 174. Similarly, the Small Business Administration testified that OSHA had underestimated the first year cost impact by over one billion dollars. Statement of Charles A. Cadwell, U.S. Small Business Administration before the Office of Management and Budget, Oct. 16, 1987.

[7] The Third Circuit's repeated references to the time intervals between agency actions and court proceedings indicates that the Third Circuit may also have shared in this frustration. *See United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 732 (3d Cir. 1985), and *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1266, 1269 (3d Cir. 1987).

II. COURTS SHOULD NOT INTERFERE WITH AGENCY ACTIONS THAT ARE LAWFUL AND REASONABLE. REVIEW IS NEEDED IN ORDER TO MAKE CLEAR THE VITALITY OF THE DOCTRINES EXPRESSED BY THE SUPREME COURT IN *VERMONT YANKEE* AND *CHEVRON*.

The Third Circuit ignored the principles of judicial restraint enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). *Vermont Yankee* limited the courts' ability to interfere in the procedural actions of agencies. 435 U.S. at 555. The Third Circuit violated this precept in a novel context that needs review by the Supreme Court. *Vermont Yankee* restrained the judiciary from imposing procedural requirements on federal agencies in *excess* of those required by Congress. In the present case, the Third Circuit interfered with the agency's chosen procedure by imposing procedural requirements *less* than those required by Congress and selected by the agency.

By compelling OSHA to skip over the procedures required by the APA and the OSH Act, the Third Circuit violated the *Vermont Yankee* principle that courts should not interfere with agency actions permissible under statute. Even assuming *arguendo* that the notice afforded non-manufacturing employers in the 1982 rulemaking was in theory legally sufficient to allow OSHA to go directly to a final rule, under *Vermont Yankee* the Third Circuit should not have ordered the agency to abandon its choice to collect more information and undertake a notice and comment rulemaking. Indeed the force of the *Vermont Yankee* rule is all the greater when, as here, the agency seeks to give more procedural safeguards and thereby avoid statutory and even constitutional questions of fairness. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Court should review this case to assert the vitality of *Vermont Yankee*. Surely it cannot be true, as one commentator has stated, that *Vermont Yankee* is "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, Administrative Law Treatise 616 (2d ed. 1978), quoted and discussed in, Scalia *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978). It is time for the Court to explain the authority and authoritativeness of *Vermont Yankee*. The Court should review this case to emphasize "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND LIMITS IMPROPERLY THE AUTHORITY OF OMB UNDER THE PAPERWORK REDUCTION ACT TO MINIMIZE PAPERWORK BURDENS IMPOSED ON THE PUBLIC.

A. The Importance of the Paperwork Reduction Act to the Hazard Communication Standard.

The Paperwork Reduction Act of 1980 ("PRA") is the culmination of longstanding efforts by Congress [8] to "minimize the Federal paperwork burden for individuals, small businesses, state and local governments and other persons." 44 U.S.C. § 3501(a)(1). The critical need for this law was established by the Commission on Federal Paperwork, which concluded in its final report that federal paperwork requirements imposed annual costs of 25

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[8] The Paperwork Reduction Act was a "rewrite" of the Federal Reports Act of 1942, and was intended to "strengthen the clearance process" established under the prior law. S. Rep. No. 96-930, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U..S Code Cong. & Admin. News 6241, 6253.

to 35 billion dollars on private industry, and 8.7 billion dollars on individuals.[9] To minimize this formidable burden, Congress directed OMB to review all information requests proposed by agencies to determine whether such collection of information "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility." 44 U.S.C. § 3504(c)(3) (1982). The effectiveness of the PRA in ameliorating the burden on the public has been great. Between 1981 and 1986, agencies subject to PRA review have reduced the paperwork burden imposed on the public by over 560 million hours annually[10] or 44 percent of the burden that existed in 1980.[11] The Administration estimated that the paperwork burden on the public in fiscal year 1988 would decrease by 66.1 million hours, representing the seventh year of reduction by the federal government since 1981.[12]

OMB adhered closely to its lawful authority in reviewing OSHA's final HCS and, based on an extensive record and detailed consultation with the agency, disapproved three limited provisions in the rule.[13] OMB's disapproval

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[9] *Final Summary Report of The Commission on Federal Paperwork* 5 (1977).

[10] March 10, 1988 Letter from James C. Miller III, Director, Office of Management and Budget, to President Ronald Reagan transmitting the Administration's Information Collection Budget for Fiscal Year 1988, 1.

[11] Executive Office of the President, Office of Management and Budget, *Regulatory Programs of the United States Government, April 1, 1987-March 31, 1988*, 1-1i.

[12] *See* March 10, 1988 letter from James C. Miller III, 1. According to the letter a net increase of approximately 140 million hours resulted from three federal statutes enacted in 1987.

[13] The Third Circuit, in ordering the Secretary to proceed directly to a final rule without the benefit of a notice of proposed rulemaking prevented OSHA from complying with 44 U.S.C. § 3504(h). That

of the requirement that material safety data sheets ("MSDSs") be exchanged by each employer at multi-employer worksites was based solely on the determination that such requirement "does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." [14] OMB also disapproved the overly narrow scope of the exemption for consumer products, stating, "the record indicates that this exemption would continue to place under the HCS large number of consumers for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." [15]

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section requires an agency to notify OMB not later than publication of notice, of any proposal rule which includes a collection of information requirement. This important procedural requirement, sponsored by Senator Kennedy as Amendment 1177 of the Senate Judiciary Committee, is intended to coordinate Executive review of collection of information requirements in agency rulemakings with regulatory oversight by the Executive Office of the President by providing the agency an opportunity to respond to OMB comments. *See* Remarks of Senator Edward Kennedy, 126 Cong. Rec. 14,689 (daily ed. Nov. 19, 1980). Thus, the Court's short-circuiting of the APA also thwarted the critical interagency deliberative process required by the Kennedy Amendment.

[14] October 28, 1987 letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, to the Honorable Thomas C. Komarek Assistant Secretary for Administration and Management, Department of Labor, disapproving the collection of information requests in the final HCS. The record is replete with examples where trade groups demonstrated in testimony before OMB that this provision of the HCS had no practical utility. These same groups provided numerous alternatives which would accomplish the same objective of workplace hazard communication without the full paperwork burden imposed by the rule. *Id.* at 7-9. *See also* October 28, 1988, "Comments and Request for Hearing by the Construction Industry Hazard Communication Coalition Proposed Revisions to OSHA Hazard Communication Standard" (53 Fed. Reg. 29,821), submitted to OSHA Docket Officer at 17-19.

[15] Letter of Gramm to Komarek at 8. The OMB record illustrated how OSHA's limited consumer product exemption (29 C.F.R.

OMB disapproved a third provision of the final HCS that would have exempted FDA regulated drugs to the extent that they are in "solid, final form for direct administration to patients." 29 C.F.R. §§ 1910.1200(b)(6)(viii)(1988). The OSHA exemption did not exclude drug capsules containing liquids or particles. The narrow scope of the exemption resulted in drug wholesalers initially having to distribute 4.8 million MSDSs despite the fact that a professional package insert of comprehensive hazard information is already included in "every single package of a prescription drug in this country." [16]

B. The Petition Should be Granted To Resolve the Conflict Between the Third and D.C. Circuits and to Reestablish the Director's Intended Role in Regulating the Paperwork Burden Imposed by Administrative Agencies.

The Third Circuit erred in ruling that the HCS requirement to collect and distribute MSDSs does not come within the reach of the PRA and that, because the recordkeeping requirement had a regulatory purpose under the OSH Act, it was exempt from PRA review. These two rulings misinterpret the law and undermine the important powers given to OMB. The Court should take this case so that OMB can fulfill its congressional man-

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§ 1910.1200(b)(6)(vii)) lacks practical utility. Under the OSHA exemption employers could not discern when the exemption would apply. Witnesses before OMB testified that this flaw would lead to exaggerated overcompliance causing a substantial paperwork burden involving the maintenance of MSDSs. Moreover, hazard information on consumer products was duplicative of that required by the Consumer Product Safety Commission. Transcript of OMB hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communications Standard*, Oct. 16, 1987, at 90, 148-52.

[16] Testimony before OMB of the National Wholesale Druggists Association. *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard, supra* note 15, at 168-79

date to limit paperwork requirements imposed on members of NAM without significant public benefit.

The D.C. Circuit has interpreted the PRA's predecessor, the Federal Reports Act of 1942 (codified at 44 U.S.C. § 3501-3520 (1976)), to apply to the collection of all information required by a federal agency for any regulatory purpose, whether or not the information is furnished directly to the agency. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The D.C. Circuit Court rejected arguments that the Federal Reports Act applied only to documents furnished to an agency. Interpreting the PRA, the court wrote that "under the Paperwork Act . . . OMB holds the same substantive power as it did under the [Federal] Reports Act. Where it determines that collection of information is unnecessary, the Agency may not proceed with the collection." *Id.* at 1453. The Court continued "[a]ppellants cannot seriously believe . . . Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record-keeping and data-gathering that constitute the burden." *Id.*

The attempt by the Third Circuit to distinguish *Action Alliance* and thus avoid the conflict is unsuccessful. The D.C. Circuit quoted the paperwork requirement that OMB lawfully disapproved: a " 'written self-evaluation of [the federal fund recipients'] compliance under the [Age Discrimination] Act' . . . [and a] self evaluation available on request to the agency *and to the public*." *Id.* at 1452 (emphasis added, citations omitted). This requirement is little different from the HCS requirement that the MSDSs be made available to employees and "upon request, to . . . the Assistant Secretary [of Labor] . . . ." 29 C.F.R. § 1910.1200(g)(11) (1988).

The Third Circuit's decision is also inconsistent with the PRA's legislative history[17] and, without so much as

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[17] The Senate Report includes within the coverage of the PRA information collected for purposes of disclosure to the public. The

a mention, rejects the OMB interpretation of the PRA. OMB's regulations, which were promulgated on March 31, 1983, define the "collection of information" as:

> the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.*

5 C.F.R. § 1320.7(c) (1988) (emphasis added). Subsection (2) of Section 1320.7(c) further provides, in part, that:

> *Requirements* by an agency, a person *to obtain or to compile information for purpose of disclosure to members of the public* at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.

(Emphasis added). Thus, the Third Circuit, without explanation, rejected a "permissible construction" of the

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Senate Report addreses public disclosures required by the Securities and Exchange Commission stating, "In this connection, federally mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purpose of the Federal Securities Laws." S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279. This view was reiterated by Sen. Chiles, the Sponsor when Congress considered amendments to the PRA in 1984. He explained:

> [t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43.

statute by the administering agency, contrary to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

The Third Circuit also mistakenly and substantially narrowed the scope of the PRA by ruling that 44 U.S.C. § 3518(e) (1982) prevents OMB from performing its statutory function with respect to paperwork requirements when the rulemaking "embodies substantive policy decision-making entrusted to the other [non-OMB] agency." *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988). This determination also conflicts with the D.C. Circuit. *Action Alliance*, 846 F.2d at 1454-55. While there may on occasion be tension between OMB duties with respect to paperwork requirements under the PRA and another agency's duties under another law, the Third Circuit's meat ax approach—OMB always looses—"carve[s] so large a slice from OMB authority" that it calls for review and adjustment by the Supreme Court. *Action Alliance*, 846 F.2d at 1455.

The plain language of the PRA shows that Congress vested sole authority in OMB to determine whether a proposed paperwork requirement imposed by a federal agency is necessary or useful in achieving a substantive policy. Under the goal of ensuring that rules of federal agencies minimize the information burden on the public, Congress ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request . . . ." 44 U.S.C. § 3507(a) (1982). Congress then directed that the function of the Director to clear information collection requests shall include a determination of whether a collection of information request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility . . . ." 44 U.S.C. § 3504(c)(2) (1982). There is nothing in the PRA that terminates this authority merely because the agency or anyone else claims that the information collection request also has a

direct regulatory function. *Action Alliance*, 846 F.2d at 1455.[18]

OMB acted on a well-developed record and after detailed consultation with OSHA. OMB carefully focused its activities *only* on requirements for the collection of information and restricted its disapproval to such requirements, leaving intact the underlying regulatory approach of OSHA. The disapproved provisions involve the collection and maintenance for purposes of public disclosure and recordkeeping of hundreds, thousands, and in some cases millions of pages of material safety data sheets,[19] precisely the area of concern at which the PRA is aimed. The Court should grant the petitions to assure OMB's ability to control such excessive and costly paperwork requirements affecting NAM and all members of the public.

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[18] The Third Circuit paid little attention to relevant legislative history when it construed § 3518(e) to deny the Director of OMB the authority to review agency rules. Prior to and during consideration of the PRA, Congress understood the Executive already to have the authority to intervene on substantive points of other agency rulemakings. *See* Pub. L. No. 94-78, § 4 (August 9, 1975) amending The Council on Wage and Price Stability Act, Pub. L. No. 93-387 (August 24, 1974).

[19] *See* OMB Docket 1218-0072 including written submissions accompanying April 2, 1987 and October 16, 1987 transcript of public hearings. For example the Small Business Administration estimated that a typical plumber must maintain 500 MSDSs compared with OSHA's estimate of 12. Ex. 2-21 (October 16, 1987). One contractor from Minnesota estimated that 55 file cabinets to maintain MSDSs may be required at a typical construction high rise site. Oct. 16, 1987, Transcript at 109.

CONCLUSION

For these reasons, and upon the entire record, the petitions for writs of certiorari should be granted in both *Associated Builders and Contractors, Inc. v. Brock* and *United Steelworkers of Am. v. Pendergrass* (USWA III).

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